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THE
CIVIL CODE

TAS
DAP
1872a
v. 1

OF THE

STATE OF CALIFORNIA.

ANNOTATED BY
CREED HAYMOND AND JOHN C. BURCH,
OF THE
CALIFORNIA CODE COMMISSION.

In Two Volumes.

VOL. I.

FIRST EDITION.

SACRAMENTO:
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DEDICATION.

TO THE HON. DAVID DUDLEY FIELD, OF NEW YORK,

*As a testimonial of their appreciation of his eminent services in the work
of law reform, this volume is respectfully inscribed by the*

CODE COMMISSIONERS OF CALIFORNIA.

CALIFORNIA CODE COMMISSION.

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PREFACE.

THE Governor of the State of California, acting under authority of law, appointed in May, eighteen hundred and seventy, three Commissioners to draft a complete system of laws, and to present the same to the Legislature next to convene. To this task the Commissioners applied themselves, and with painstaking care and great labor completed and presented a report in four volumes, respectively entitled the "POLITICAL," "CIVIL," "CIVIL PROCEDURE," and "PENAL" CODES. These were critically examined by an Advisory Committee, consisting of two eminent members of the legal profession—Messrs. Sidney L. Johnson and Charles A. Tuttle—and, after a careful review by the Legislative Committees, were enacted into laws. Each is to a great extent independent of the other.

The POLITICAL CODE comprises those matters which pertain to the Government of the State, the powers and duties of its officers, and the nature and management of its public institutions.

The CIVIL CODE embraces the rights of persons, their relations toward each other, and the rules applicable to and governing property; or, in other words, comprehends within its scope those divisions of the law which are defined by Blackstone as "The Rights of Persons" and "The Rights of Things."

The CODE OF CIVIL PROCEDURE relates to Courts of justice and judicial officers, etc., and the *means* employed for the enforcement of rights and the remedies for their violation.

The PENAL CODE consists of a systematic classification of public wrongs or offenses against the State, and laws for their prevention or for the punishment of those offending.

The reasons which prompt the publication of an *annotated* edition may be briefly stated: In the interpretation of statute law, Courts have always professed to be governed to some extent by the intent of the Legislature, and to take judicial notice of the right sought to be established or the mischief intended to be avoided. The authors of the notes to this edition, having been members of the Commission which drafted the Codes and in constant attendance upon the meetings of the Advisory and Legislative Committees, have had ample opportunity to inform themselves upon these subjects.

A Code of laws, from its universality, cannot be always readily adapted, especially by those unskilled in the profession, to fit each individual case.

It is, then, the object of the notes attached to the various sections of the Codes to explain the *reason* and *intent* of the law, to make it clear and easy of comprehension, and to show its application, not only generally, but to circumstances which, though within the *principle*, may not fall strictly within the *letter*, of the statute. Thus, for example, where in illustration of a particular section several leading decisions are given, it will be seen that, though they may all be in support of the *principle*, yet the facts or minutiae of the cases are very diverse. It may in this way frequently happen that the reader, by reference to a section enunciating a comprehensive legal proposition, will find in the note thereto cases which run parallel with and afford a satisfactory solution of the difficulties involved in the questions which he has under investigation. In some places the Code modifies or alters what has heretofore been the law. Wherever this occurs the reason for the change is given—the hardships which existed under the former law, and how the present enactment applies to prevent their future occurrence. It is not presumed that the work is perfect. Indeed, the authors realize that there is room for much improvement; but their anxiety to place before the public, at as early a day as possible, the laws of the State, thus annotated and enriched with the learning of many distinguished jurists and the decisions of Courts of high standing, must plead their excuse. A copyright

has, however, been obtained for the work, and should it meet with the favor and approbation of the public, a foundation will at least have been laid upon which they can in future erect a more finished and complete structure. Little is claimed for this edition on the ground of originality, except in digesting and arranging under their appropriate heads the decisions of Courts and extracts from leading law writers. But when it is borne in mind that the notes contain references to over ten thousand reported cases, beside extensive reference to text books, it will be perceived that much time and labor have been expended in their production. All the statutes passed by the Legislature of 1871-2, which affect any provisions of the Code, are printed in the form of notes under the sections to which they relate.

An exhaustive index to the subject matter (prepared by Mr. Curtis H. Lindley) accompanies the work, and also a list of abbreviations used in the notes. There are also published herewith the Constitutions of the United States and of the State of California, carefully annotated, and Part V of the POLITICAL CODE.

The authors deem this an appropriate place to render to Mr. Cameron H. King, Secretary of the Code Commission, their acknowledgments for the valuable services rendered by him in assisting in the annotation and in the preparation of this work for the press.

CREED HAYMOND,
JOHN C. BURCH.

SACRAMENTO, CAL., August 1st, 1872.

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LIST OF ABBREVIATIONS.

Abbreviations.	State.	Reports and Authorities.
Abb. Adm.....	U. S. Dist. N. Y.	Abbott.
Abb. Pr.....	New York.....	Abbott's Practice Reports.
Abb. Pr. N. S.....	New York.....	Abbott's Practice Reports, New Series
Ab. Sh.....		Abbott's Shipping.
Abr. Ca. Eq.....		Abridgment of Cases in Equity.
Acc., or Ag., or Agr.....		Accord or Agrees.
Act.....		Acton's Reports, Prize Causes.
Act. Reg.....		Acta Regia.
Addis.....	Pennsylvania.....	Addison.
Ad. Con.....		Addison's Contracts.
Ad. E.....		Adams on Ejectment.
Ad. & E. or A. & E.....		Adolphus & Ellis' Reports, K. B.
Add. E. R.....		Addams' Ecclesiastical Reports.
Ad. Torts.....		Addison on Torts.
Adm.....		Admiralty.
Aik.....	Vermont.....	Aikens.
Ala.....	Alabama.....	Alabama, New Series.
Ala. Sel. Cases.....	Alabama.....	Shepherd.
Al.....		Aleyn's Reports, K. B.
Ald. Cond.....	Pennsylvania.....	Alden.
Allen.....	Massachusetts.....	Allen.
Al. & Nap.....		Alcock & Napier, K. B., Ireland.
Alc. Reg. C.....		Alcock's Registry Cases, Ireland.
Alison, Prac.....		Alison's Practice of the Criminal Law of Scotland.
Alison, Princ.....		Alison's Principles of ditto.
Amb.....		Ambler's Reports, Chancery.
And.....		Anderson's Reports, C. P.
Andr.....		Andrew's Reports, K. B.
Annaly.....		Reports, time Hardwicke, K. B.
Anst.....		Anstruther's Reports, Exch.
A. P. B. Ashurst, MSS.		
L. I. L.....		Ashurst, J., Paper Book.
Arch. B. L.....		Archbold's Bankrupt Law.
Arch. Cr. L.....		Archbold's Criminal Law.
Arch. J. P.....		Archbold's Justice of the Peace.
Arch. P. by Ch.....		Archbold's Practice, by Chitty.
Arch. Sum.....		Archbold's Summary of the Laws of England.
Ark.....	Arkansas.....	Arkansas Reports.
Arkley.....		Arkley's Justiciary Reports, Scotland.
Arms. M. & O.....		Armstrong, Macartney, and Ogle's Report's, N. P., Ireland.
Ash.....	Pennsylvania.....	Ashmead.

Abbreviations.	State.	Reports and Authorities.
A. S. or Act of Sed.....		Act of Sederunt, Court of Sessions.
Ass.....		Assize, Book of.
Ast. Ent.....		Aston's Entries.
Atk.....		Atkyn's Reports, Chancery.
Auth.....		Authentica.
Ayl. Pan.....		Ayliffe's Pandects.
Ayl. Par.....		Ayliffe's Parergon Juris.
Bac. Abr.....		Bacon's Abridgment.
Bailey.....	South Carolina.....	Bailey's Law.
Bailey's Ch.....	South Carolina.....	Bailey's Chancery.
Bald.....	U. S. 3d Dist. Ct.	Baldwin.
Barb. S. C.....	New York.....	Barbour's Supreme Court.
Barb. Chan.....	New York.....	Barbour's Chancery.
B. & A. or Barn. & Ald.		Barnewall and Alderson's Reports, K. B.
B. & Ad. or Bard & Adol.		Barnewall and Adolphus' Reports, K. B.
B. & C. or Barn. & Cress.		Barnewall and Cresswell's Reports, K. B.
B. C. C.....		Bail Court Cases, Lowndes & Maxwell.
B. C. R.....		Bail Court Reports, Saunders & Cole.
Balf.....		Balfour's Practicks [sic] of the Law of Scotland.
Ball & B.....		Ball and Beatty's Reports, Chancery, Ireland.
Banc. Sup.....		Upper Bench.
Bank. I.....		Bankton's Institutes of the Laws of Scotland.
Bar. & Arn.....		Barron and Arnold's Election Cases.
Bar. & Aust.....		Barron and Austin's Election Cases.
Barn. K. B.....		Barnardiston's Reports, K. B.
Barn. C.....		Barnardiston's Reports, Chancery.
Barnes.....		Barnes' Notes, C. P.
Batt.....		Batty's Reports, K. B., Ireland.
Bay.....	South Carolina.....	Bay.
Bayl. B.....		Bayley on Bills.
Beat.....		Beatty's Chancery Reports, Ireland.
Beas.....	New Jersey.....	Beasley.
Beav.....		Beavau's Reports, Rolls Courts.
Beaw.....		Beawes' Lex Mercatoria.
Bea.....	U. S. Dist. S. C..	Bea.
Bel.....		Bellewe's Reports, K. B.
Bel. App.....		Bell's Cases on Appeal from Scotland.
Bell Com.....		Bell (G. J.), Commentaries on the Law of Scotland.
Bell Illust.....		Bell (G. J.), Illustrations of Principles.
Bell Prin.....		Bell (G. J.), Principles of the Law of Scotland.
Bell C. (folio and 8vo)...		Bell (R.), Cases, Court of Sessions.
Bell's C. C.....		Bell's Crown Cases.
Bell C. T.....		Bell (R.), on Completing Titles, Scot- land.
Bell's Dict.....		Bell (R.), Dictionary of the Law of Scotland.
Bell L.....		Bell (R.), on Leases, Scotland.
Bell Styles.....		Bell (R.), System of the Forms of Deeds of Scotland.
Bell T. D.....		Bell (R.), on the Testing of Deeds, Scotland.
Bened.....	U. S. 2d Cir. Ct.....	Benedict.
Benl. Bendl.....		Benloe or Bendloe's Reports, K. B.
Benl. & Dal.....		Benloe and Dalisen's Reports, C. P.

Abbreviations.	State.	Reports and Authorities.
Bibb	Kentucky	Bibb.
Bing .....	.....	Bingham's Reports, C. P.
Bing. N. C. ....	.....	Bingham's New Cases, C. P.
Binney	Pennsylvania	Binn.
B. Tr. ....	.....	Bishop's Trial
Bl .....	.....	Blount.
Black	U. S. Supr. Court	Black.
Blackf	Indiana	Blackford.
Bland's Ch.	Maryland	Bland's Chancery.
Blatch	U. S. 2d Cir. Ct.	Blatchford.
Blatch. Pr. Ca.	U. S. Dist. N. Y.	Blatchford.
Bl. & How.	U. S. Dist. N. Y.	Blatchford & Howland.
Bl., D. & Osb. ....	.....	Blackham, Dundas, and Osborne's Reports, N. P., Ireland.
Bl. R. ....	.....	Mr. Justice Blackstone's Reports.
Black. W. ....	.....	Sir Wm. Blackstone's Reports, C. P.
Black. H. ....	.....	Blackstone's Commentaries.
Bli. ....	.....	Bligh's Reports, House of Lords.
Bli. N. S. ....	.....	Blight's Reports, New Series.
B. N. C. ....	.....	Brooke's New Cases, K. B.
B. N. P. ....	.....	Buller's Nisi Prius.
B. P. B. ....	.....	Paper Book of Buller.
B. & P. or Bos. & Pul. ....	.....	Bosanquet and Puller's Reports, C. P.
Bo. R. Act. ....	.....	Booth's Real Actions.
Bos. & P. N. R. ....	.....	Bosanquet and Puller's New Reports, C. P.
Bosw.	New York	Bosworth.
Bott. ....	.....	Bott's Poor Laws.
Br. ....	.....	Alexander Bruce's Reports, Court of Session.
Br. Bro. ....	.....	Brooke, Browne, Brownlow.
Br. Brev. Jud. & Ent. ....	.....	Brownlow Brevia Judicialia, etc.
Br. N. C. ....	.....	Brooke's New Cases, K. B.
Bradf.	New York	Bradford's Surrogate.
Brac. ....	.....	Bracton de Legibus.
Brayt.	Vermont	Brayton.
Brev.	South Carolina	Brevard.
Bridg. ....	.....	Bridgman's Reports, C. P.
Bridg. O. ....	.....	Orlando Bridgman's Reports, C. P.
Bright, H. & W. ....	.....	Bright's Husband and Wife.
Bright.	Pennsylvania	Brightly Nisi Prius.
Bro. Ab. ....	.....	Brooke's Abridgment.
Bro. Ent. ....	.....	Brown's Entries.
Bro. Stair. ....	.....	Brodie's Notes and Supplement to Stair's Institutions, Scotland.
Bro. S. ....	.....	Brown's Treatise on Law of Sale, Scotland.
Bro. C. C. ....	.....	Brown's Chancery Reports (Eden or Belt).
Bro. P. C. ....	.....	Brown's Parliament Cases.
Bro. Supp. ....	.....	Brown's Supplement to Morrison's Dictionary, Court of Session.
Bro. Syn. ....	.....	Brown's Synopsis of Decisions, Court of Session.
Bro. V. M. ....	.....	Brown's Vade Mecum.
Brock.	U. S. 4th Cir. Ct.	Brockenbrough.
Brock.	Virginia	Brockenbrough.
Brock. & Holmes.	Virginia	Brockenbrough & Holmes.
Broun. ....	.....	Broun's Justiciary Reports, Scotland.
Browne	Pennsylvania	Browne (P. A.)
Brownl. Redv., or Ent. ....	.....	Brownlow's Redivivus.
B. or C. B. ....	.....	Common Bench.

Abbreviations.	State.	Reports and Authorities.
Brownl.....		Brownlow and Gouldesborough's Reports, C. P.
B. R.....		King's Bench.
B. & S.....		Best and Smith's Reports, Q. B.
Buck.....		Buck's Reports in Bankruptcy.
Bull. N. P.....		Buller's Nisi Prius.
Bulst.....		Bulstrode's Reports, K. B.
Bunb.....		Bunbury's Reports, Ex.
Burnett.....	Wisconsin.....	Burnett.
Busb. L.....	North Carolina.....	Busbee's Law.
Busb. Eq.....	North Carolina.....	Busbee's Equity.
Bush.....	Kentucky.....	Bush.
B. Just.....		Burn's Justice.
B. Eccl. L.....		Burn's Ecclesiastical Law.
Burr.....		Burrow's Reports, K. B.
Burr. S. C.....		Burrow's Settlement Cases.
Bynk.....		Bynkershoek.
Byth. Pr.....		Bythewood's Precedents.
C.....		Codex (Juris Civilis).
Caine's R.....	New York.....	Caines' Reports.
Caine's Cas.....	New York.....	Caines' Cases.
Cal. or Cala. R.....	California.....	California Reports.
Car. L. Rep.....	North Carolina.....	Carolina Law Repository.
Call.....	Virginia.....	Call.
O. B.....		Common Bench Reports, or Manning, Granger, and Scott's Reports.
C. B., N. S.....		Common Bench Reports, New Series.
C. C.....		Cases in Chancery or Crown Cases.
C. C. A.....		County Court Appeals.
C. C. R.....		Crown Cases Reserved.
C. L. R.....		Common Law Reports.
C. & J. or Crompt. & J.....		Crompton and Jervis' Reports, Ex.
C. & M. or Crompt. & M.....		Crompton and Meeson's Reports, Ex.
C. M. & R. or Crompt. M. & R.....		Crompton, Meeson, and Roscoe's Reports, Ex.
C. C. N. Y.....	New York.....	Civil Code New York.
Cam. & Nor. or C. & N.....	North Carolina.....	Cameron & Norwood.
C. S.....		Court of Sessions, Scotland.
C. T. N.....		Cases in the time of L. C. Northington.
Ca. temp. F.....		Cases temp. Fitch.
Ca. temp. Holt.....		Cases in the time of Holt, C. J. K. B.
Ca. temp. H.....		Cases time Hardwicke, K. B.
Cald.....		Caldecott's Reports, K. B.
Ca.....		Case, or Placita.
Ca. t. K.....		Cases time King, Chancery.
Cal.....		Callis.
Calth.....		Calthorpe's Reports, K. B.
Cam. Scacc.....		Camera Scaccarii, Exchequer Chamber.
Camp. N. P.....		Campbell's Reports, Nisi Prius.
O. & K. or Car. & Kir.....		Carrington and Curran Reports, N. P.
Car. & M.....		Carrington and Marshman.
Car. H. & A.....		Carrow, Hamerton, and Allen, Session Cases.
C. & P. or Car. & P.....		Carrington and Paine Reports, N. P.
Carp. P. C.....		Carpmael's Patent Cases.
Cart.....		Carter's Reports, C. P.
Cary.....		Cary's Reports, Chancery.
Carth.....		Carthew's Reports, K. B.
Cas. t. Talb.....		Cases time Talbot, Chancery.
Cas. Pra. C. P.....		Cases of Practice, Common Pleas.
Cas. B. R.....		Cases temp Will. 3 (12 Mod.)

Abbreviations.	State.	Reports and Authorities.
Cas. L. Eq.....		Cases in Law and Equity (10 Mod.)
Cas. Six Cir.....		Cases on the Six Circuits, Ireland.
C. P.....		Common Pleas.
C. L. P. Act.....		Common Law Procedure Act.
C. Theod.....		Codex Theodosiani.
Ca. P. or Parl.....		Cases in Parliament.
Ca. C. L.....		Cases in Crown Law.
Ca. Pra. K. B.....		Cases of Practice in King's Bench.
Cawl.....		Cawley.
Charlt.....	Georgia	Charlton (T. U. P.)
Charlt. R. M.....	Georgia	Charlton (R. M.)
Cheves.....	South Carolina	Cheves' Law.
Cheves' Eq.....	South Carolina	Cheves' Equity.
Ch. Cas.....		Cases in Chancery.
Ch. Cas. Ch.....		Choice Cases in Chancery.
Ch. Pre.....		Precedents in Chancery.
Ch. R.....		Reports in Chancery.
Chris. B. L.....		Christian's Bankrupt Law.
Ch. Burns' J.....		Chitty's Burns' Justice.
Ch. Pl.....		Chitty on Pleading.
Ch. Crim. L.....		Chitty's Criminal Law.
Ch. Bills.....		Chitty on Bills.
Chipm.....	Vermont	Chipman (D.)
N. Chipm.....	Vermont	Chipman (N.)
Cook.....	Tennessee	Cooke.
Cooper.....		Cooper's Reports, Chancery.
Co. Rep.....		Coke's Reports, K. B.
Cooke B. L.....		Cooke's Bankrupt Laws.
Coop. t. Brough.....		Cooper's Cases temp Brougham.
Coop.....		Cooper (G.), Chancery.
Coo. & Al.....		Cooke and Alcock's Reports, K. B., Ireland.
Corb. & D.....		Corbett and Daniell, Election Cases.
Cot.....		Cotton.
Cowen.....	New York	Cowen.
Cowp.....		Cowper's Reports, K. B.
Cox.....		Cox's Reports, Chancery.
Cox C. C.....		Cox's Criminal Cases.
Coxe.....	New Jersey	Coxe.
Cr.....		Craig, Jus Feudale Scotland.
Cr. Cir. C.....	U. S. Circuit Ct.	Cranche's Circuit Court.
Crabbe.....	U. S. Penn. Dist.	Crabbe.
Cr. & Ph.....		Craig and Phillips, Chancery.
Cr. & St.....		Craigie and Stewart's Reports, House of Lords.
Craw. & D.....		Crawford and Dix's Circuit Cases, Ireland.
Craw. & D. Ab. C.....		Crawford and Dix's Abridged Cases, Ireland.
Cro. (1, 2, 3).....		Croke (Eliz. Jam. Cha.), K. B. and C. P. Cro. sometimes refers to Keilwey's Reports, published by Serj. Croke.
Crompt.....		Crompton on Courts.
Cru.....		Cruise's Digest.
Cunn.....		Cunningham's Reports, K. B.
Curt.....		Curtels' Ecclesiastical Reports.
Curtis.....	U. S. 1st Cir. Ct.	Curtis.
Curt. Dec.....	U. S. Supr. Court	Curtis' Decisions.
Cush.....	Massachusetts	Cushing.
Chit. Con.....		Chitty on Contracts.
Chit. Rep.....		Chitty's Reports, Bail Court.

Abbreviations.	State.	Reports and Authorities.
Chit. G. P.....	.....	Chitty's General Practice.
Chit. Jun. B.....	.....	Chitty, Jun., on Bills.
Clark Ch.....	New York.....	Clark's V. Chancery.
Clay.....	.....	Clayton's Reports, York Assize.
Cl. & Fin.....	.....	Clark and Finnely Reports, House of Lords.
Cl. Ass.....	.....	Clerk's Assistant.
Cliff.....	U. S. 1st Cir. Ct.....	Clifford.
Clift.....	.....	Clift's Entries.
Co.....	.....	Coke's Reports.
C., Cod., or Cod. Jur. Civ.....	.....	Codex (Juris Civilis) Justinian Codex.
Co. Cop.....	.....	Coke's Copyholder.
Co. Ent.....	.....	Coke's Entries.
Co. Lit.....	.....	Coke on Littleton (1 Inst.)
Co. M. C.....	.....	Coke's Magna Charta (2 Inst.)
Co. P. C.....	.....	Coke's Pleas of the Crown (3 Inst.)
Co. on Courts.....	.....	Coke's 4 Inst.
Code Nap.....	.....	Code Napoléon.
Code Civ. or C. C.....	.....	Code Civil Français, or Code Napoléon.
Code Comm.....	.....	Code de Commerce.
Code P.....	.....	Code Pénal.
Code P. C.....	.....	Code de Procédure Civile.
Code R.....	New York.....	Code Reports.
Code Rep.....	New York.....	Code Reporter.
Cold.....	Tennessee.....	Coldwell.
Coleman Cas.....	New York.....	Coleman's Cases.
Coleman & Caine.....	New York.....	Coleman & Caines' Cases.
Col. C. C.....	.....	Collyer's Chancery Cases.
Colles.....	.....	Colles' Cases in Parliament.
Coll. Jurid.....	.....	Collectanea Juridica.
Coll. Part.....	.....	Collyer on Partnership.
Comb.....	.....	Comberbach's Reports, K. B.
Com.....	.....	Comyn's Reports, K. B. and C. P.
Com. Dig.....	.....	Comyn's Digest.
Com. Law Rep.....	.....	Common Law Reports.
Comst. (1-4 N. Y. Rep.).....	New York.....	Comstock.
Cam. & Nor. or C. & N.....	North Carolina.....	Conference, Cameron and Norwood.
Con. R.....	Connecticut.....	Connecticut.
Con. & Law.....	.....	Connor and Lawson's Reports, Chancery, Ireland.
Const.....	South Carolina.....	Constitutional (Mill).
Consist.....	.....	Consistory Reports, Haggard.
Cont.....	.....	Contra.
Con. Reps.....	U. S. Supr. Court.....	Cranch & Cox.
Ct. of App.....	New York.....	Hand.
City Hall Rec.....	New York.....	City Hall Records.
D.....	.....	Dictum Digest (Juris Civilis).
D. or Dig.....	.....	Justiniani Digestæ, sive Pandectæ.
D. or Dict.....	.....	Dictionary (Morison's) Court of Session.
D. & L. or Dow. & L.....	.....	Dowling and Lowndes, Bail Court Reports.
D. & R. or Dow. & Ry.....	.....	Dowling and Ryland's K. B. Reports.
D. & M.....	.....	Davison and Marivale, Q. B. Reports.
D. N. S.....	.....	Dowling, New Series, Bail Court Reports.
D. P. B.....	.....	Dampier, J., Paper Book.
Dal.....	.....	Dalison's Reports, C. P.
Dall. S. C.....	U. S. Supr. Court.....	Dallas.
Dall. C. C.....	U. S. 8d Cir. Ct.....	Dallas.
Dall.....	Pennsylvania.....	Dallas.
Dallas.....	.....	Dallas Styles, Scotland.

Abbreviations.	State.	Reports and Authorities.
Dalr.....		Dalrymple's Decisions, Court of Session.
Dalr. F. L.....		Dalrymple's Feudal Law.
Dalt.....		Dalton's Justice or Sheriff.
Daly C. P.....	New York.....	Daly Common Pleas.
Dana.....	Kentucky.....	Dana.
D'An.....		D'Anvers' Abridgment.
Dan.....		Daniel's Reports, Ex. Eq.
Dan. & Ll.....		Danson and Lloyd, Mercantile Cases.
Dav.....		Davy's Reports, Ireland.
Day.....	Connecticut.....	Day.
Deac.....		Deacon's Bankruptcy Cases.
D. & C. or Deac. & Ch.....		Deacon and Chitty, Bankruptcy Reports.
De G.....		De Gex's Bankruptcy Reports.
De G., F. & J.....		De Gex, Fisher, and Jones' Reports, Chancery.
De G. & J.....		De Gex and Jones' Reports, Chancery.
De G., J. & S.....		De Gex, Jones, and Smith's Reports, Chancery.
De G., M. & G.....		De Gex, Macnaghten, and Gordon's Report's Chancery.
De G. & Sm.....		De Gex and Smale's Reports, Chancery.
Dea. & Sw.....		Deane and Swabey's Reports, Probate and Divorce.
Dears. C. C.....		Dearsley's Crown Cases.
Dears. & B. C. C.....		Dearsley and Bell's Crown Cases.
Deas & And.....		Deas and Anderson's Reports, Court of Session.
Degge.....		Degge's Parson's Companion.
Denio.....	New York.....	Denio.
Den. Cr. C.....		Denison's Crown Cases.
Desaus. Eq.....	South Carolina.....	Desaussure's Equity.
Dev. C. C.....	U. S. Ct. of Claims.....	Devereux.
Dev. Eq.....	North Carolina.....	Devereux Equity.
Dev. L.....	North Carolina.....	Devereux Law.
Dev. & Bat.....	North Carolina.....	Devereux and Battle's Law.
Dev. & Bat. Eq.....	North Carolina.....	Devereux and Battle's Equity.
Di. Dy.....		Dyer's Reports, K. B.
Dick.....		Dickens' Reports, Chancery.
Dick. Just.....		Dickinson's Justice.
Dig.....		Digest of Writs.
Dirl.....		Dirleton's Decisions, Court of Session.
Dis.....	Ohio.....	Disney.
Doct. Pl.....		Doctrina Placitandi.
D. & S.....		Doctor and Student.
Dod.....		Dodson's Reports in Admiralty.
Dom. Proc.....		Domini Proctor, Cases House of Lords.
Doug.....		Douglas' Reports, K. B.
Dougl.....	Michigan.....	Douglass.
Dow.....		Dow's Reports in Parliament.
Dow & C.....		Dow & Clark, House of Lords' Cases.
Dowl. & R. M. C.....		Dowling and Ryland's Magistrates' Case.
Dowl. & Ry. N. P.....		Dowling and Ryland's Nisi Prius.
Dowl. P. C.....		Dowling's Practice Cases.
Dr. & Wal.....		Drury and Walsh, Chancery Reports, Ireland.
Dr. & War.....		Drury and Warren, Chancery Reports, Ireland.
Drew.....		Drewry's Reports, Chancery.

Abbreviations.	State.	Reports and Authorities.
Drew. & Sm.....		Drewry & Smale's Reports, Chancery.
Drury		Drury's Reports, Chancery, Ireland.
Dub.....		Dubitatur.
Dud. (Geo.).....	Georgia.....	Dudley.
Dud. (S. C.).....	South Carolina.....	Dudley's Law.
Dud. Eq.....	South Carolina.....	Dudley's Equity.
Duer.....	New York.....	Duer.
Duff.....		Duff on Conveyancing, Scotland.
Dudg. Orig.....		Dugdale's Origines.
Dug. S.....		Dugdale's Summons.
Duke.....		Duke's Charitable Uses.
Dunlop or D.....		Dunlop, Bell, and Murray's Reports, Court of Session.
Durnf. & E.....		Durnford and East, or Term Reports, K. B.
Durie		Durie's Reports, Court of Session.
Dutch.....	New Jersey.....	Dutcher.
Duval.....	Kentucky.....	Duval.
Duval.....	Texas.....	Duval.
E.....		Easter Term.
E. & A. or Ecc. & Ad.....		Eccles. and Admiralty Reports.
E. of Cov.....		Earl of Coventry's Case.
Eag. & Yo.....		Eagle and Younge's Tithe Cases.
East.....		East's Reports, K. B.
East P. C.....		East's Pleas of the Crown.
Eden.....		Eden's Rep. of Northington's Cases, Chancery.
Edg.....		Edgar's Reports, Court of Session.
Edicta.....		Edicts of Justinian.
Edw. Ch.....	New York.....	Edwards Vice Chancery.
Edw. A. R.....		Edwards' Admiralty Reports.
El. B. & S.....		Ellis, Best, and Smith's Reports, Q. B.
El. & Bl.....		Ellis and Blackburn, Reports, Q. B.
El., B. & E.....		Ellis, Blackburn, and Ellis' Reports, Q. B.
El. & El.....		Ellis and Ellis' Reports, Q. B.
Eq. Ca. Abr.....		Equity Cases Abridged.
Eq. Rep.....		Equity Reports.
Esp.....		Espinasse's Rep. or Digest, N. P.
Exch. Rep.....		Welsby, Hurlstone, and Gordon's Re- ports.
Exp.....		Expired.
F.....		Consuetudines Feudorum.
F. or Fitz.....		Fitzherbert.
F. B. C.....		Fonblanque's Bankruptcy Cases.
F. & F.....		Foster and Finlayson's Reports, Nisi Prius.
F. N. B.....		Fitz-Nat. Brevium.
Fac. Coll. or F. C.....		Faculty Collection of Reports, Court of Session.
Falc.....		Falconer's Reports, Court of Session.
Falc. & Fitz.....		Falconer and Fitzherbert, Election Cases.
Far.....		Farresley (7 Mod. Rep.)
Fearne		Fearne on Remainders.
Ferg.....		Fergusson's Consistory Reports, Scot- land.
Ff.....		Pandectæ (Juris Civilis).
Fisher.....	U. S. Cir. Courts.	Fisher.
Fin.....		Finch's Reports, Chancery.
Fitz-G.....		Fitz-Gibbons' Reports, K. B.
Fl.....		Fleta.

Abbreviations.	State.	Reports and Authorities.
Fla.....	Florida.....	Florida.
Flan. & K.....	.....	Flanagan and Kelly's Reports, Rolls, Ireland.
Fol.....	.....	Foley's Poor Laws.
Fol. Dict.....	.....	Kames and Woodhouselee, Dictionary, Court of Session.
Fonbl.....	.....	Fonblanque on Equity.
For.....	.....	Forrest's Reports, Ex.
For. Pla.....	.....	Brown's Formula.
Forb.....	.....	Forbes' Decisions, Court of Session.
Forester.....	.....	Cases time of Talbot, Chancery.
Fort. de Laud.....	.....	Fortescue de laudibus Angliæ Legum.
Fortes.....	.....	Fortescue's Reports, K. B.
Post. Forst.....	.....	Foster's Reports, Crown Law.
Fount.....	.....	Fountainhall's Decisions, Court of Session.
Fox & S.....	.....	Fox and Smith's Reports, K. B., Ireland.
fr.....	.....	Fragment, or Excerpt, or Laws, in titles of Pandects.
Fra. M.....	.....	Francis' Maxims.
Fraser.....	.....	Fraser on Personal and Domestic Relations, Scotland.
Free. Chy.....	.....	Freeman's Chancery Reports.
Freem. K. B.....	.....	Freeman's Reports, K. B.
Freem. Ch.....	Mississippi.....	Freeman's Chancery.
G. & J.....	.....	Glyn and Jameson, Bankruptcy Reports.
Gail.....	.....	Gail Institutionum Commentarii IV.
Gal. & Dav.....	.....	Gale and Davison's Reports, K. B.
Gall.....	U. S. 1st Cir. Ct.....	Gallison.
Gaz. B.....	.....	Gazette of Bankruptcy.
Geo.....	Georgia.....	Georgia.
Geo. Dec.....	Georgia.....	Georgia Decisions.
Gib. Cod.....	.....	Gibson's Codex
Gif.....	.....	Giffard's Reports, Chancery.
Gilb. C. P.....	.....	Gilbert's Common Pleas.
Gill.....	Maryland.....	Gill.
Gill & Johns.....	Maryland.....	Gill & Johnson.
6-10 Ill.....	Illinois.....	Gilman.
Gilmer, or Va.....	Virginia.....	Gilmer.
Gilm.....	.....	Gilmour's Reports, Court of Session.
Gilp.....	U. S. Penn. Dist.....	Gilpin.
Gl.....	.....	Glossa, a Gloss or Interpretation.
Glanv.....	.....	Glanville de Legibus.
Glassc.....	.....	Glasscock's Reports in all the Courts, Ireland.
Godb.....	.....	Godbolt's Reports, K. B.
Godol.....	.....	Godolphin.
Golds.....	.....	Gouldesborough's Reports, K. B.
Gosf.....	.....	Gosford's Reports, Court of Session.
Gow's N. P. C.....	.....	Gow's Nisi Prius Cases.
Grant's Cas.....	Pennsylvania.....	Grant.
Gratt.....	Virginia.....	Grattan.
Gray.....	Massachusetts.....	Gray.
Green.....	New Jersey.....	Green.
Green Ch.....	New Jersey.....	Green's Chancery.
Green C. E. Ch.....	New Jersey.....	Green's (C. E.) Chancery.
Greene.....	Iowa.....	Greene.
Gro. de J. B.....	.....	Grotius de Jure Belli.
Gundry.....	.....	Gundry MSS.
Gwm.....	.....	Gwillim's Tithe Cases.

Abbreviations.	State.	Reports and Authorities.
H. or Hil.....		Hilary Term.
H. & C.....		Hurlstone and Coltman's Reports, Ex.
H. & N.....		Hurlstone and Norman's Reports, Ex.
H. H. P. C.....		Hale's Hist. Plac. Cor.
H. L. Rep., or Cas.....		Clark and Finnely's House of Lords' Reps., New Series.
H. P. C.....		Hale's Pleas of the Crown.
Ha. & Tw.....		Hall and Twells, Chancery Reports.
Had.....		Earl of Haddington's Reports, Court of Session.
Hagans	West Virginia.....	Hagans.
Hag. Ec.....		Haggard's Ecclesiastical Reports.
Hag. Con.....		Haggard's Consistory Reports.
Hag. Adm.....		Haggard's Admiralty Reports.
Hailes.....		Haile's Decisions, Court of Session.
Hale C. L.....		Hale's Common Law.
Hall.....	New York.....	Hall's Superior Court.
Halst.....	New Jersey.....	Halsted.
Halst. Ch.....	New Jersey.....	Halsted's Chancery.
Hand.....	Ohio	Handy.
Hans.....		Hansard's Entries.
Hanm.....		Hanmer's Lord Kenyon's Notes, K. B.
Harc.....		Harcarse's Decisions, Court of Session.
Hard.....		Hardes Reports, Ex.
Hardin.....	Kentucky	Hardin.
Hare.....		Hare's Reports, Chancery.
Harp.....	South Carolina.....	Harper's Law.
Harp. Eq.....	South Carolina.....	Harper's Equity.
Harring.....	Delaware.....	Harrington.
Harring. Mich. Ch.....	Michigan.....	Harrington's Chancery.
13-24 Penn. St.....	Pennsylvania.....	Harris.
Har. & Gill.....	Maryland	Harris & Gill.
Har. & Johns.....	Maryland	Harris & Johnson.
Har. & M.....	Maryland	Harris & McHenry.
Har. (N. J.).....	New Jersey	Harrison.
Harr. Dig.....		Harrison's Digest, all the Courts.
Hawk. P. C.....		Hawkins Pleas of the Crown.
Hawkins.....	Louisiana	Hawkins.
Hawks.....	North Carolina.....	Hawks.
Hayw. (N. C.).....	North Carolina.....	Haywood. Vols. 1 and 2.
Hayw. (Tenn).....	Tennessee.....	Haywood. Vols. 3, 4, and 5.
Hayes.....		Hayes' Reports, Exchequer, Ireland.
Hayes & J.....		Hayes and Jones' Reports, Exch., Ireland.
Head.....	Tennessee	Head.
Hein.....		Heineccius.
Hem. & M.....		Hemming and Miller, Chancery.
Hemp.....	U. S. 9th Cir. Ct.....	Hempstead.
Hemp.....	U. S. Ark. Dist.....	Hempstead.
Hen. & Mun.....	Virginia.....	Hening & Munford.
Her.....		Herne.
Het.....		Hetley's Reports, C. P.
Hill (N. Y.).....	New York.....	Hill.
Hill (S. C.).....	South Carolina.....	Hill's Law.
Hill Eq.....	South Carolina.....	Hill's Equity.
Hill & Denio.....	New York.....	Hill & Denio (Lalor's Supplement).
Hilt. C. P.....	New York.....	Hilton's Common Pleas.
Hob.....		Hobart's Reports, K. B.
Hoff. Land Cases.....	California	Hoffman.
Hoffm. Ch.....	New York.....	Hoffman's V. Chancery.
Hog.....		Hogan's Reports, Rolls, Ireland.
Holcombe.....	U. S. Supreme Ct.....	Holcombe.

Abbreviations.	State.	Reports and Authorities.
Holt.....		Holt's Reports, K. B.
Holt N. P.....		Holt's Nisi Prius Reports.
Home (Clk).....		Clerk Home's Reports, Court of Session.
Hope.....		Thomas Hope's Reports, Court of Session.
Hope Min. Pr.....		Sir Thomas Hope's Minor Practicks [sic], Scotland.
Hope Maj. Pr.....		Sir Thomas Hope's Major Practicks [sic], Scotland.
Hopk. Ch.....	New York.....	Hopkins' Chancery.
Hopk.....	U. S. Dist. Court..	Hopkinson's Adm. Decisions (in Gilpin's Rep.)
Houst.....	Delaware.....	Houston.
Hov. Suppl.....		Hovenden's Supplement to Veasey Junr.
How. S. C.....	U. S. Supreme Ct.	Howard.
How. Ca.....	New York.....	Howard's Court of Appeals Cases.
How. Pr.....	New York.....	Howard's Practice Reports.
Hughes.....	Kentucky.....	Hughes.
Humph.....	Tennessee.....	Humphreys.
Hud. & B.....		Hudson and Brooke's Reports, K. B., Ireland.
Hugh.....		Hughe's Entries.
Hume Com.....		Hume's Commentaries on Crimes, Scotland.
Hume.....		Hume's Decisions, Court of Session.
Hunter.....		Hunter's Law of Landlord and Tenant, Scotland.
Hut.....		Hutton's Reports, C. P.
Ill.....	Illinois.....	Illinois.
Ind.....	Indiana.....	Indiana.
Imp. K. B.....		Impey's Practice, K. B.
In F.....		<i>In fine.</i> At the end of a title, law, or paragraph.
In F. Pr.....		<i>In fine principii.</i>
In Pr.....		<i>In principio.</i> In the beginning, and before the first paragraph of a law.
Ins.....		Insurance.
1, 2, Inst.....		(1, 2) Coke's Inst.
Inst., 1, 2, 3.....		Justinian's Inst. lib. 1, tit. 2, sec. 3.
Inst. I., 2, 3, 1.....		Justinian's Institutes, Lib. I, tit. 2, sec. 31.
Iowa.....	Iowa.....	Iowa.
Ired.....	North Carolina.....	Iredell's Law.
Ired. Eq.....	North Carolina.....	Iredell's Equity.
Ir. Law & Eq.....		Irish Law and Equity Reports, Ireland.
Ir. Law & Ch.....		Irish Law and Equity Reports, Ireland, New Series.
Iv. Ersk.....		Ivory's Notes on Erskine's Institutes.
J. Ctus.....		Juris Consultus.
J. & W. or Jac. & W.....		Jacob and Walker's Reports, Chancery.
Jac. or Jacob.....		Jacob's Reports, Chancery.
Jan. Angl.....		Jani Anglorum.
Jebb C. C.....		Jebb's Crown Cases, Ireland.
Jebb & B.....		Jebb and Bourke's Reports, K. B., Ireland.
Jebb & S.....		Jebb and Syme's Reports, K. B., Ireland.
Jeff. Va.....	Virginia.....	Jefferson.
Jenk.....		Jenkins' Reports, Ex.

Abbreviations.	State.	Reports and Authorities.
John.....		Johnson's Reports, Chancery.
John. & H.....		Johnson and Hemming's Reports, Chancery.
Johns.....	New York.....	Johnson.
Johns. Cas.....	New York.....	Johnson's Cases.
Johns. Ch.....	New York.....	Johnson's Chancery.
Jon. 1, 2.....		Jones' W. and T. Reports, K. B.
Jones T.....		Jones' Reports, K. B.
Jones W.....		Jones' Reports, K. B.
Jones.....		Jones' Reports, Exch., Ireland.
Jones.....	North Carolina.....	Jones' Law.
Jones Equity.....	North Carolina.....	Jones' Equity.
Jones & C.....		Jones and Carey's Reports, Exch., Ireland.
Jo. & Lat.....		Jones and Latouche's Reports, Chancery, Ireland.
Jud.....		Judgments.
Jur.....		The Jurist Reports in all the Courts.
Jur. N. S.....		Jurist, New Series.
Jur. (Sc.).....		Scottish Jurist, Court of Session.
Jur. St.....		Juridical Styles, Scotland.
Just. Inst.....		Justinian's Institutes.
K. B.....		King's Bench.
K. C. R.....		Rep. temp King, C. Chancery.
K. & G. R. C.....		Keane and Grant's Registration Cases.
Kames.....		Kames' Decisions, Court of Session.
Kames' Eluc.....		Kames' Elucidations of the Law of Scotland.
Kames' Rem. D.....		Kames' Remarkable Decisions, Court of Session.
Kames' S. D.....		Kames' Select Decisions, Court of Session.
Kames' Tr.....		Kames' Historical Law Tracts, Scotland.
Kan.....	Kansas.....	Kansas.
Kay.....		Kay's Reports, Chancery.
Kay & J.....		Kay and Johnson's Reports, Chancery.
Keb.....		Keble's Reports, K. B.
Keen.....		Keen's Reports, Rolls Court.
Kel.....		Sir John Kelyng's Reports, K. B.
Kel. 1, 2.....		William Kelynge's Reports, 2 parts, Chancery.
Keilw. Kel.....		Keilwey's Reports, K. B.
Ken.....		Kennet.
Kent Comm.....		Kent's Commentaries on the Law of the United States.
Keny.....		Kenyon's Notes, by Hammer, K. B.
Keyes.....	New York.....	Keyes.
Kilk.....		Lord Kilkerran's Decisions, Court of Session.
Kit.....		Kitchen.
Kn.....		Knapp's Reports, Privy Council.
Kn. & O.....		Knapp and Ombler, Election Cases.
Ky. Dec.....	Kentucky.....	Kentucky Decisions.
L. & G. temp Plunker.....		Lloyd and Goid temp Plunket, Chy., Ireland.
L. I. L.....		Lincoln's Inn Library.
L. J.....		Law Journal, Reports in all the Courts.
L. M. & P.....		Lowndes, Maxwell, and Pollock's Reports, Bail Court.
L. & M.....		Lowndes, Maxwell, and Pollock's Reports, Bail Court.

Abbreviations.	State.	Reports and Authorities.
L. Mag.....		The Law Magazine.
L. P. B.....		Paper Book of Lawrence, J.
L. Rev.....		The Law Review.
L. T.....		Law Times, Reports in all the Courts.
L. & Welsb.....		Lloyd and Welsby's Commercial Reports.
La.....		Lane's Reports, Exchequer.
La. or La. Reps.....	Louisiana	Louisiana.
La. Ann.....	Louisiana	Louisiana.
Lab.....	California	Labatt.
Lansing.....	New York	Lansing.
Lat.....		Latch's Reports, K. B.
Law. Rec.....		Law Recorder, Reports in all the Courts, Ireland.
Leg. O. or Leg. Obs.....		The Legal Observer.
Ld. Ken.....		Kenyon's Reports, K. B.
Ld. Raym.....		Lord Raymond's Reports, K. B.
Leach.....		Leach's Crown Law.
Lee & H.....		Lee's Cases temp Hardwicke, K. B.
Leigh.....	Virginia	Leigh.
Leon.....		Leonard's Reports, K. B.
Lester.....	Georgia	Lester.
Lev.....		Leving's Reports, K. B.
Lewis.....	Nevada	Lewis.
Lew. C. C.....		Lowin's Crown Cases.
Lex Merc. Red.....		Lex Mercatoria, by Beawes.
Ley.....		Ley's Reports, K. B.
Libb. Ass.....		Liber Assisarum, Year Book, pt. 5.
Lib. Int.....		Liber Intrationum.
Lib. Reg.....		Register Book.
Lib. Feud.....		Liber Feudorum, usually printed at the end of the Corpus Juris Civilis.
Lib. Intr.....		Old Book of Entries.
Lib. Pl.....		Liber Placitandi.
Lil.....		Lilly's Reports or Entries.
Lil. Abr.....		Lilly's Practical Register.
Lind. or Lynd.....		Lindewood Provinciales.
Lit.....		Littleton's Reports, C. P.
Lit. with S.....		Littleton, S. for Section.
Litt.....	Kentucky	Littell.
Litt. Sel. Ca.....	Kentucky	Littell's Select Cases.
Living.....	New York	Livingston.
Llo. & Goo.....		Lloyd and Gould, temp Sugden, Chy., Ireland.
Locc.....		Loccenius.
Lockw. R. C.....	New York	Lockwood's Reversed Cases.
Lofft.....		Lofft's Reports, K. B.
Long Quinto.....		Year Book, pt. 10, K. B.
Longf. & T.....		Longfield and Townsend's Reports, Exch., Ireland.
Lud. E. C.....		Luder's Election Cases.
Lush.....		Lushington's Admiralty Reports.
Lut.....		Lutwyche's Reports, C. P.
Lut. R. C.....		Lutwyche's Registration Cases.
Me. or Me. Reps.....	Maine	Maine.
M. or Mich.....		Michaelmas Term.
M., D. & D.....		Montagu, Deacon, and De Gex's Reports, Bankruptcy.
M. & M'A.....		Montagu and M'Arthur's Reports, Bankruptcy.
M. & Ayr. R.....		Montagu and Ayrton's Reports, Bankruptcy.

Abbreviations.	State.	Reports and Authorities.
M. & Ayr. B. L.....		Montagu and Ayrton's Bankrupt Law.
M. & S., or Mau. & Sel.....		Maule and Selwyn's Reports, K. B.
M. & W., or Mee. & W.....		Meeson and Welsby's Reports, Ex.
McCle.....		M'Cleland's Reports, Ex.
M'Cle. & Yo.....		M'Cleland and Younge's Reports, Ex.
M'F. R.....		MacFarlane's Reports, Jury Court, Scotland.
Mac. & G.....		Macnaghten and Gordon's Reports, Chancery.
Mac. P. C.....		Macrory's Patent Cases.
Mack.....		Sir G. Mackenzie's Institution of the Law of Scotland.
Mack. R. L.....		Mackenzie's Roman Law.
Mack. Crim.....		Sir G. Mackenzie's Criminal Law.
Mack. Obs.....		Sir G. Mackenzie's Observations on Acts of Parliament.
Macl. & R.....		Maclea and Robinson's Scotch Appeals.
Macph.....		Court of Session, Third Series.
Macq. H. L. Cas.....		Macqueen's Scotch Appeal Cases.
Mad.....		Madox's Exchequer and Formulæ.
Madd.....		Maddock's Reports, Chancery.
Madd. Ch.....		Maddock's Chancery Practice.
Mal.....		Malynes's Lex Mercatoria.
Man. & G.....		Manning and Granger's Reports, C. P.
Man. & R.....		Manning and Ryland's Reports, K. B.
Manw.....		Manwood's Forest Laws.
Mar.....		March's Reports, K. B.
Marsh.....		Marshall's Reports, C. P.
Marsh. In.....		Marshall on Insurance.
Marsh. A. K.....	Kentucky	A. K. Marshall.
Marsh. J. J.....	Kentucky	J. J. Marshall.
Martin (N. C.).....	North Carolina	Martin.
Martin (La.).....	Louisiana	Martin.
Martin N. S.....	Louisiana	Martin, New Series.
Mart. & Yerg.....	Tennessee	Martin and Yerger.
Mau. & Pol. Sh.....		Maude and Pollock's Law of Shipping.
Mas.....	U. S. 1st Cir. Ct.	Mason.
Mass. or Mas. R.....	Massachusetts	Massachusetts.
Md. or Md. Reps.....	Maryland	Maryland.
Md. Ch. Dec.....	Maryland	Maryland Ch. Dec.
22-24 Conn.....	Connecticut	Matson.
M'All.....	U. S. C. C. Cal.	M'Allister.
M'Art.....	New Jersey	M'Arter's Chancery.
M'Bride.....	Missouri	M'Bride.
1 Ohio St.....	Ohio	M'Cook.
M'Cord.....	South Carolina	M'Cord's Law.
M'Cord Eq.....	South Carolina	M'Cord's Equity.
M'Lean.....	U. S. 7th Cir. Ct.	M'Lean.
M'Mullan Eq.....	South Carolina	McMullan's Equity.
M'Mullan.....	South Carolina	M'Mullan's Law.
18 Mich.....	Michigan	Meddaugh.
Meek.....	Florida	Meek.
Meigs.....	Tennessee	Meigs.
Mer. or Meriv.....		Merivale's Reports, Chancery.
Met.....	Massachusetts	Metcalf.
Met. Ky.....	Kentucky	Metcalf.
Middx. Sit.....		Sittings for Middlesex at Nisi Prius.
Mich.....	Michigan	Michigan.
Miles.....	Pennsylvania	Miles.
Milw.....		Milward's Reports, Irish Ecclesiastical.
Mitf.....		Mitford's Pleadings.

Abbreviations.	State.	Reports and Authorities.
Minn.	Minnesota.....	Minnesota.
Min.	Alabama.....	Minor.
Miss. or Mis. Reps.	Mississippi.....	Mississippi.
Mo. or Mo. Reps.	Missouri.....	Missouri.
Mod. Ca......	.....	Modern Cases.
Mod. C. L. & Eq., 1, 2......	.....	Modern Cases in Law and Equity (8 and 9 Mod. Rep.)
Mod. Ent......	.....	Modern Entries.
Mod. Int. 1, 2......	.....	Modus Intrandi, 1, 2.
Mod. Rep......	.....	Modern Reports, K. B.
Mol. de J. M......	.....	Molloy's de Jure Maritimo.
Mol......	.....	Molloy's Chancery Reports, Ireland.
Mo......	.....	Moore's Reports, K. B.
Mon.	Kentucky.....	Monroe (T. B.)
Mon. B.	Kentucky.....	Monroe (B.)
Mont. B. C......	.....	Montagu's Reports, Bankruptcy.
Mont. & B......	.....	Montagu and Bligh's Reports, Bankruptcy.
Mont. & Chit......	.....	Montagu and Chitty's Reports, Bankruptcy.
Moo. C. C......	.....	Moody's Crown Cases.
Moo. & M......	.....	Moody and Malkin's Reports, N. P.
Moo. P. C. C......	.....	Moore's Privy Council Cases.
Moo. Ind. Ap......	.....	Moore's India Appeals.
Moo. & R......	.....	Moody and Robinson Reports, N. P.
Moo. J. B......	.....	J. B. Moore's Reports, C. P.
Moo. & P......	.....	Moore and Payne's Reports, C. P.
Moo. & S......	.....	Moore and Scott's Reports, C. P.
Moore (C. P.).....	.....	Moore's Common Pleas Reports.
More St......	.....	More's Notes on Stair's Institutions, Scotland.
M. or Mor. Dict......	.....	Morison's Dictionary of Decisions, Court of Session.
Morris	Iowa.....	Morris.
Mos......	.....	Moseley's Reports, Chancery.
Munf.	Virginia.....	Munford.
Murph.	North Carolina.....	Murphey.
Murr......	.....	Murray's Reports, Jury Court, Scotland.
My. & Cr......	.....	Mylne and Craig's Reports, Chancery.
Myl. & K......	.....	Mylne and Keen's Reports, Chancery.
Napt.	Missouri.....	Napton.
N. Benl......	.....	New Benloe, K. B. Reports.
N. C., or No. Ca. Ecc. & M. Cts......	.....	Notes of Cases in the Ecclesiastical and Maritime Courts.
N. L......	.....	Nelson's Lutwyche Reports, C. P.
N. Nov......	.....	Novella (Juris Civilis).
N. R......	.....	New Reports, by Bosanquet and Fuller, C. P.
N. R......	.....	Not Reported.
N. S......	.....	New Series.
N. H.	New Hampshire.....	New Hampshire.
N. Y.	New York.....	New York.
N. Y. Ct. App.	New York.....	New York Court of Appeals.
N. & M.	South Carolina.....	Nott & M'Cord.
N. C. Term.	North Carolina.....	North Carolina Term.
Nels......	.....	Nelson's Reports, Chancery.
Nev.	Nevada.....	Nevada.
Nev. & M......	.....	Neville and Manning's Reports, K. B.
Nev. & P......	.....	Neville and Perry's Reports, K. B.
New Rep......	.....	New Reports in all the Courts.

Abbreviations.	State.	Reports and Authorities.
Newb. Adm.....	U. S. Dist. Mich- igan, etc.....	Newberry.
Nic. Ha. C.....		Nicholl, Hare, and Carrow, Railway Cases.
No. N.....		Nova Narrationes.
Nol. Sett.....		Nolan's Settlement Cases.
North.....		Northington's Reports, by Eden, Chy.
Nott. & Hun.....	U. S. Ct. of Claims	Nott and Huntington.
Noy.....		Noy's Reports, K. B.
O. Benl.....		Old Benloe, C. P.
Off. Br.....		Officina Brevium.
Off. Ex.....		Office of Executors.
Ohio.....	Ohio.....	Ohio.
Ohio St.....	Ohio.....	Ohio State.
Or.....	Oregon.....	Oregon.
Ord. Cla.....		Orders, Lord Clarendon's.
Ord. Ch.....		Orders in Chancery.
Orl. Bridgman.....		Orlando Bridgman's Reports, C. P.
Olcott.....	U. S. Dist. N. Y..	Olcott.
Olney.....	Oregon.....	Olney.
Ought.....		Oughton's Ordo Judiciorum.
Overt. or Tenn.....	Tennessee.....	Overton.
Ow.....		Owen's Reports, K. B.
P. C.....		Pleas of the Crown.
P. C. Act.....		Probate Court Act.
P. & D. or Per. & Dav.....		Perry and Davison's Reports, K. B.
P. Pas.....		Easter Term.
P. R. C. P.....		Practical Register in Common Pleas.
P. W.....		Peere Williams' Reports, Chancery.
Paige Ch.....	New York.....	Paige's Chancery.
Paine.....	U. S. 2d Cir. Ct..	Paine.
Pal.....		Palmer's Reports, K. B.
Par.....		Parker's Reports, Ex.
Park Ins.....		Park on Insurance.
Parker C. R.....	New York.....	Parker's Criminal Reports.
Par. Cas.....	Pennsylvania.....	Parsons' Equity Cases.
Pasch.....	Texas.....	Paschal.
Pat. App. Bas.....		Parton's Appeal Cases House of Lords.
Pea.....		Peake's Reports, N. P.
Peak. Ad. Cas.....		Peake's Additional Cases.
Peak. N. P. C.....		Peake's Nisi Prius Cases.
P. & H.....	Virginia.....	Patton and Heath.
Peck.....	Tennessee.....	Peck.
Pen.....	New Jersey.....	Pennington
Penn. St.....	Pennsylvania.....	Pennsylvania State.
Penn. Rep.....	Pennsylvania.....	Penrose and Watts.
Perk.....		Perkins' Conveyances.
Per. & K.....		Perry and Knapp, Election Cases.
Pet. Ad. Dec.....	U. S. Penn. Dist..	Peters' Admiralty.
Pet. C. C. R.....	U. S. 3d Cir. Ct..	Peters' Circuit Court.
Pet.....	U. S. Supr. Court	Peters.
Pet. Cond.....	U. S. Supr. Court	Peters' Condensed.
Ph.....		Phillip's Reports, Chancery.
Ph. Ev.....		Phillip's Evidence.
Pick.....	Massachusetts.....	Pickering.
Phil. Law.....	North Carolina.....	Phillips' Law.
Phil. Eq.....	North Carolina.....	Phillips' Equity.
Phillim.....		Phillmore's Reports, Ecclesiastical.
Pig.....		Piggott's Recoveries.
Pig. & R.....		Piggott and Rodwell's Election Cases.
Pl. Com.....		Plowden's Com. or Reports, K. B.
P. pla. P. p.....		Placita.

Abbreviations.	State.	Reports and Authorities.
Pol.....	.....	Polluxfen's Reports, K. B.
Poph.....	.....	Popham's Reports, K. B.
2 Poph.....	.....	Cases at the end of Popham's Reports.
Port.....	Alabama.....	Porter.
Post.....	Missouri.....	Post.
Postleth. Dict.....	.....	Postlethwaite's Universal Dictionary of Trade and Commerce.
Pow. R. & D.....	.....	Power, Rodwell, and Dew's Election Cases.
Pr. Ch.....	.....	Precedents in Chancery (Finch.)
Pr. Co.....	.....	Prerogative Court.
Pr. Fale.....	.....	President Falconer's Reports, Court of Session.
Pr. Reg. Ch.....	.....	Practical Register in Chancery.
Pres. Conv.....	.....	Preston's Conveyancing.
Pres. Abs.....	.....	Preston on Abstracts.
Pres. Es.....	.....	Preston on Estates.
Pres. Shep. T.....	.....	Sheppard's Touchstone, by Preston.
Price or Pr.....	.....	Price's Reports, Exchequer.
Priv. Lond.....	.....	Privilegia Londini.
Pr. St.....	.....	Private Statute.
Q.....	.....	Quorum.
Q. Attach.....	.....	Quoniam Attachiamenta.
Q. B.....	.....	Adolphus and Ellis, Queen's Bench Reports, New Series.
Q. War.....	.....	Quo Warranto.
Quin.....	Massachusetts.....	Quincey.
Quinti Quinto.....	.....	Year Book, 5 Henry V.
R.....	.....	Resolved, Repealed.
R. S. L.....	.....	Reading Statute Law.
R. T. H.....	.....	Reports time of Hardwicke, C. J. B. R.
R. T. H.....	.....	Reports time of Holt, C. J. B. R.
Rail. C.....	.....	Railway Cases.
Rand.....	Virginia.....	Randolph.
Rast.....	.....	Rastell's Entries and Statutes.
Rawle.....	Pennsylvania.....	Rawle.
Rawle, Pen., & Watts...	Pennsylvania.....	Rawle, Penrose, and Watts.
Ray. T.....	.....	Sir Thomas Raymond's Reports, K. B.
Raym.....	.....	Raymond.
Red. on Car., etc.....	New York.....	Redfield on Carriers, etc.
Redf.....	New York.....	Redfield's Surrogate.
Reev. E. L.....	.....	Beeve's English Law.
Reg. Brev.....	.....	Register of Writs.
Reg. Pl.....	.....	Regula Placitandi.
Reg. Jud.....	.....	Registrum Judiciale.
Reg. Maj.....	.....	Rooks of Regiam Magistatem, Scotl'd.
Rep. (1, 2, etc.).....	.....	1, 2 Coke's Reports, etc.
Rep. Ch.....	.....	Reports in Chancery.
Rep. Eq.....	.....	Gilbert's Reports in Equity.
Rep. Q. A.....	.....	Reports time of Queen Anne.
Rep. temp Finch.....	.....	Finch's Reports, Chancery.
R. I.....	Rhode Island.....	Rhode Island.
Rice.....	South Carolina.....	Rice's Law.
Rice Eq.....	South Carolina.....	Rice's Equity.
Rich.....	South Carolina.....	Richardson's Law.
Rich. Eq.....	South Carolina.....	Richardson's Equity.
Rich. Eq. Ca.....	South Carolina.....	Richardson's Equity Cases.
Rich.....	New Hampshire.....	Richardson.
Rich. C. P.....	.....	Richardson's Practice, Common Pleas.
Ridgw. Ap.....	.....	Ridgeway's Appeals, Ireland.
Ridge & H.....	.....	Ridgeway, temp Hardwicke, Chy.
Riley.....	South Carolina.....	Riley's Law.

Abbreviations.	State.	Reports and Authorities.
Ridg. L. & S.....		Ridgeway, Lapp, and Schoales' Reports, K. B. Ireland.
Riley's Eq.....	South Carolina.....	Riley's Equity.
Rob.....		Robinson's Entries.
Robards.....	Texas.....	Robards.
Rob. A.....		Robinson's Reports Admiralty, or Robertson Reports of Appeals.
Robb.....	U. S. Supr. and Cir. Courts.....	Robb.
Robb. E.....		Robertson's Ecclesiastical Reports.
Robert (1-4).....	New York.....	Robertson.
Robert. Ap.....		Robertson's Appeal Cases, Scotland.
Roll. and Roll. Abr.....		Rolle, Reports and Abridgment.
Roll.....		Roll of the Term.
Rose.....		Rose's Reports, Bankruptcy.
Ross.....		Ross's Lectures on Conveyancing, etc., Scotland.
Ross L. C.....		Ross' Leading Cases.
Root.....	Connecticut.....	Root.
Rub.....		Rubrics. In such a Rubric or Title.
Run. Eject.....		Runninton's Ejectment.
Rush.....		Rushworth's Collections.
Russ.....		Russell's Reports, Chancery.
Russ. & M.....		Russell and Mylne's Reports, Chy.
Russ. & R.....		Russell and Ryan's Crown Cases.
Ry. F.....		Rymer's Fœdera.
Ry. & M.....		Ryan and Moody, N. P. Reports.
Sec. or ?.....		Section.
S. B.....		Upper Bench.
S. C.....		Same Case.
S. C. Rep.....	South Carolina.....	South Carolina.
S. C. C.....		Select Chancery Cases.
S. C. Rep.....		Supreme Court (in reference to citation of American) Reports.
S. or S. & D.....		Shaw and Dunlop, Court of Session, First Series.
S. P.....		Same Point or Principle.
S. & S. or Sim. & St.....		Simon's and Stuart's Reports, Chy.
S. & Sm.....		Searle and Smith's Reports, Probate and Divorce.
Salk.....		Salkeld's Reports, K. B.
Sand.....	New York.....	Sandford.
Sand. Ch.....	New York.....	Sandford's Vice Chancery.
Sau. & Sc.....		Sausse and Scully's Reports, Rolls, Ireland.
Saund. & C.....		Saunders and Cole, Bail Court Reps.
Saund.....		Saunders' Reports, K. B.
Sav.....		Savile's Reports, C. P.
Saxt. Ch.....	New Jersey.....	Saxton's Chancery.
Say.....		Sayer's Reports, K. B.
Sc. Jur.....		Scottish Jurist, Court of Session.
Scac.....		Scaccaria Curia, Court of Exchequer.
Sch. & Lef.....		Schoale and Lefroy's Reports, Chancery, Ireland.
Sc. or Scott.....		Scott's Reports, C. P.
Sc. N. R.....		Scott's New Reports, C. P.
Scriv. Cop.....		Scriven on the Law of Copyholds.
Selw. N. P.....		Selwyn's Nisi Prius.
Sect.....		Section.
Sel. Ca.....		Select Cases, Chancery.
Seld.....		Selden.
Sem.....		Semble, seems.

Abbreviations.	State.	Reports and Authorities.
Sess. Ca.....		Session Cases, and Carrow, Hamerton, and Allen.
Sh.....		Shaw Reports, Court of Session Cases, First Series.
Sh. App.....		Shaw's Report of Appeal Cases, House of Lords.
Sh. Dig.....		Shaw's Digest of Decisions, Scotland.
Sh. & McL.....		Shaw and McLean's Reports of Appeal Cases, House of Lords.
Shand Pr.....		Shand's Practice, Court of Session.
Shep. Touch.....		Sheppard's Touchstones.
Show.....		Shower's Reports, K. B.
Shower's P. C.....		Shower's Parliament Cases.
Sid.....		Siderfin's Reports, K. B.
Sim. or Sim. N. S.....		Simons, or Simons' New Series Reports, Chancery.
Skene.....		Sir John Skene's De Verborum Significatione.
Skin.....		Skinner's Reports, K. B.
Sm. & G.....		Smale & Giffard's Reports, Chancery.
Sm. Action.....		Smith's (John W.) Action at Law.
Sm. Con.....		Smith's Contracts.
Sm. Landl. & Ten.....		Smith's Landlord and Tenant.
Sm. L. C.....		Smith's Leading Cases.
Sm. Merc. Law.....		Smith's Compendium of Mercantile Law.
Sm. Eq. Manual.....		Smith's (Jos. W.) Manual of Equity.
Sm. Law of Prop.....		Smith's Compendium of the Law of Real and Personal Property.
Sm. Mast. & Serv.....		Smith's (Charles Manley) Master and Servant.
Smi. & Bat.....		Smith and Batty's Reports, K. B., Ireland.
Smith.....		Smith's Reports, K. B.
Sm. & M. Ch.....	Mississippi.....	Smedes and Marshall's Chancery.
Smith.....	Ohio.....	Smith.
Smith (Ind.).....	Indiana.....	Smith.
Smith C. P.....	New York.....	Smith's Common Pleas.
Smith & Bates.....	U. S. Supr. Court.....	Smith and Bates.
Smythe.....		Smythe's Reports, C. P., Ireland.
Sneed.....	Tennessee.....	Sneed.
South.....	New Jersey.....	Southard.
Sol. J.....		Solicitor's Journal.
Som.....		Somner, Somers.
Speers.....	South Carolina.....	Speers' Law.
Speers' Eq.....	South Carolina.....	Speers' Equity.
Spel.....		Spelman.
Spencer.....	New Jersey.....	Spencer.
Spottis.....		Sir B. Spottiswoode's Reports, Court of Session.
Spottiswoode.....		Spottiswoode's Styles, Scotland.
Sprague.....	U. S. Dist. Mass.....	Sprague.
St.....		Stair's Institutions of the Law of Scotland.
Stair.....		Lord Stair's Reports, Court of Session.
Stark. C. L.....		Starkie's Criminal Law.
Stark. Ev.....		Starkie's Evidence.
Stark. N. P.....		Starkie's Reports, N. P.
Stat. W.....		Stat. Westminster.
Staunf. St. P. C. & Pr.....		Staunforde, Pleas and Prerogative.
Steph. Com.....		Stephen's Commentaries.
Stew.....	Alabama.....	Stewart.

Abbreviations.	State.	Reports and Authorities.
Stew. & Port.....	Alabama.....	Stewart and Porter.
Stew. Ans.....	.....	Sir J. Stewart's Answer to Dirleton's Doubts, Scotland.
Stock.....	Maryland.....	Stockett.
Stockt. Ch.....	New Jersey.....	Stockton's Chancery.
Story.....	U. S. 1st Cir. Ct.....	Story.
Story L. U. S.....	.....	Story's Laws of the United States.
Story B. Exch.....	.....	Story's Bills of Exchange.
Story Bail.....	.....	Story on Bailments.
Story Con.....	.....	Story's Conflict of Laws.
Story Const.....	.....	Story upon the Constitution.
Story Eq. Jur.....	.....	Story's Equity Jurisprudence.
Story Eq. Pl.....	.....	Story's Equity Pleading.
Story Pl.....	.....	Story's Pleading.
Story Pr.....	.....	Story's Promissory Notes.
Stra.....	.....	Strange's Reports, K. B.
Strob.....	South Carolina.....	Strobhart's Law.
Strob. Eq.....	South Carolina.....	Strobhart's Equity.
Stuart.....	.....	Stuart, Milne, and Peddie's Court of Session Reports.
Sty.....	.....	Style's Reports, K. B.
St. Tri.....	.....	State Trials.
Sug. Y. & P.....	.....	Sugden's Vendors.
Sug. P.....	.....	Sugden's Powers.
Sumn.....	U. S. 1st Cir. Ct.....	Sumner.
Sup. Ct. U. S.....	United States.....	Supreme Court of the United States.
Sup. Ct. U. S. C. R.....	.....	Supreme Court United States, Condensed Reports.
Sw. Ad.....	.....	Swabey's Admiralty Reports.
Sw. & Tr.....	.....	Swabey and Tristram's Reports, Probate and Divorce.
Swan.....	Tennessee.....	Swan.
Swans.....	.....	Swanston's Reports, Chancery.
Swin.....	.....	Swinburn on Wills.
T. & M.....	.....	Temple and Mew's Criminal Appeal Cases.
T. R.....	.....	Teste Rogo.
T. R.....	.....	Term Reports (Durnford and East), K. B.
T. R. E. or T. E. R.....	.....	Tempore Regis Edwardi.
Taml.....	.....	Tamlyn's Reports, Rolls.
Tapp.....	Ohio.....	Tappan.
Taunt.....	.....	Taunton's Reports C. P.
Taylor.....	North Carolina.....	Taylor.
Tenn. or Overt.....	Tennessee.....	Tennessee.
Texas.....	Texas.....	Texas.
Th.....	.....	Thompson on Bills and Notes, Scotl'd.
Th. Dig.....	.....	Theloall's Digest.
Th. Br.....	.....	Thesaurus Brevium.
Thach. C. C.....	Massachusetts.....	Thacher's Criminal Cases.
Tinw.....	.....	Lord Tinwald's Reports, Court of Session.
Tidd P.....	.....	Tidd's Practice.
Toth.....	.....	Tothill's Reports, Chancery.
Tr. Eq.....	.....	Treatise of Equity.
Trem.....	.....	Tremaine, Pleas of Crown.
Trin.....	.....	Trinity Term.
Tudor Ca. M. L.....	.....	Tudor's Leading Cases on Mercantile Law.
Tudor Cas. Pr.....	.....	Tudor's Leading Cases on Real Property.
Turn.....	.....	Turner.

LIST OF ABBREVIATIONS.

LXXV

Abbreviations.	State.	Reports and Authorities.
Turn. & R.....	.....	Turner and Russell's Reports, Chy.
Tuck.....	New York.....	Tucker.
Tyler.....	Vermont.....	Tyler.
Tyrw.....	.....	Tyrwhitt's Reports, Exchequer.
Tyrw. & G.....	.....	Tyrwhitt and Granger's Reports, Exchequer.
U. K.....	.....	United Kingdom.
Ulp.....	.....	Ulpiani Fragmenta.
U. S. Sp. Ct.....	.....	United States Supreme Court.
V. & B. or Ves. & Bea.....	.....	Vesey and Beames' Reports, Chy.
V. C.....	Virginia.....	Virginia Cases.
Van Ness.....	U. S. Dist. N. Y.....	Van Ness.
Vatt.....	.....	Vattel's Law of Nations.
Vaugh.....	.....	Vaughn's Reports, C. P.
Vent.....	.....	Ventris' Reports, K. B.
Ves.....	.....	Vesey's (Sen.) Reports, Chancery.
Ves. Jun.....	.....	Vesey's (Jun.) Reports, Chancery.
Vet. Entr.....	.....	Old B. Entries.
Vet. N. Br.....	.....	Old Nat. Brev.
Vern.....	.....	Vernon's Reports, Chancery.
Vern. & S.....	.....	Vernon and Scriven's Reports, K. B. Ireland.
Vid.....	.....	Vidian's Entries.
Vin. Abr.....	.....	Viner's Abridgment.
Vin. Sup.....	.....	Viner's Supplement.
Vt.....	Vermont.....	Vermont.
Vrom.....	New Jersey.....	Vroom's Law.
W. 1, W. 2.....	.....	Statutes Westminster, 1, 2.
W. R.....	.....	Weekly Reporter, in all the Courts.
W. & S. App.....	.....	Wilson and Shaw's Reports, House of Lords.
Wall. S. C.....	U. S. Supr. Court.....	Wallace.
Wall.....	U. S. 3d Cir. Ct.....	Wallace.
Wall., Jr.....	U. S. 3d Cir. Ct.....	Wallace, Jr.
Wallis.....	.....	Wallis' Reports, Chancery, Ireland.
Walk. Ch.....	Michigan.....	Walker's Chancery.
Ware.....	U. S. Dist. Maine.....	Ware.
Wash.....	Virginia.....	Washington.
Wash. C. C.....	U. S. 3d Cir. Ct.....	Washington's Circuit Court.
Wats.....	.....	Watson.
Wat. Cop.....	.....	Watkins' Copyholds.
Watts.....	Pennsylvania.....	Watts.
Web. P. C.....	.....	Webster's Patent Cases.
Welsh.....	.....	Welsh, Registry Cases, Ireland.
Wendell.....	New York.....	Wendell.
Went. Off. Exor.....	.....	Wentworth's Office of Executor.
Went. E.....	.....	Wentworth's Executor.
West H. L.....	.....	West's Reports, House of Lords.
West & H.....	.....	West's Reports, Chy., temp Hardwicke.
Whart.....	Pennsylvania.....	Wharton.
Wheat.....	U. S. Supr. Court.....	Wheaton.
Wh. Cr. Cas.....	New York.....	Wheeler's Criminal Cases.
Wright.....	.....	Wightwicke's Reports, Exchequer.
Wils.....	.....	Wilson's Reports, K. B.
Wils. Ch.....	.....	Wilson's Chancery Reports.
Wils. Ex.....	.....	Wilson's Exchequer Reports.
Wiles.....	.....	Wiles' Reports, K. B. and C. P.
Wilm.....	.....	Wilmot's Notes and Opinions, K. B.
Win.....	.....	Winch's Reports, C. B.
Win. Law.....	North Carolina.....	Winston's Law.
Win. Eq.....	North Carolina.....	Winston's Equity.

Abbreviations.	State.	Reports and Authorities.
Wis.....	Wisconsin.....	Wisconsin.
Wm. Rob.....	.....	William Robinson's New Admiralty Reports.
Wms.....	.....	Williams' Reports, or Peere Williams, Chancery.
Wms. Ex.....	.....	Williams' Law of Executors.
Wms. Jus.....	.....	Williams' Justices.
Wolf. & B.....	.....	Wolferstan and Bristow's Election Cases.
Wolf. & D.....	.....	Wolferstan and Dew's Election Cases.
H Wood.....	.....	Hutton Wood's Decrees in Tithe Cases.
Woodf. L. & T.....	.....	Woodfall's Law Landlord and Tenant.
Wright N. P.....	Ohio.....	Wright Nisi Prius.
W. & S.....	Pennsylvania.....	Watts and Sergeant.
Wythe's Ch.....	Virginia.....	Wythe's Chancery.
Yates.....	New York.....	Yates' Select Cases.
Y. B.....	.....	Year Book.
Y. & C. or You. & Co. .	.....	Younge and Collyer's Equity Exch.
Y. & C. C. C.....	.....	Younge and Collyer's Chancery Cases.
Y. & J. or You. & Jer...	.....	Younge and Jervis, Reports, Excheq'r.
Yeates.....	Pennsylvania.....	Yeates.
Yelv.....	.....	Yelverton's Reports, K. B.
Yerg.....	Tennessee.....	Yerger.
You.....	.....	Younge's Reports, Exchequer.
Zab.....	New Jersey.....	Zabriskie.

THE CIVIL CODE

OF THE

STATE OF CALIFORNIA.

IN FOUR DIVISIONS.

THE
CIVIL CODE
OF THE
STATE OF CALIFORNIA.

AN ACT
TO
ESTABLISH A CIVIL CODE.

[Approved March 21st, 1872.]

*The People of the State of California, represented in Senate
and Assembly, do enact as follows:*

TITLE OF THE ACT.

1. This Act shall be known as ~~THE~~ CIVIL CODE Title and Divisions of this Act.
OF THE STATE OF CALIFORNIA, and is in Four Divisions,
as follows:

- I.—THE FIRST RELATING TO PERSONS.
 - II.—THE SECOND TO PROPERTY.
 - III.—THE THIRD TO OBLIGATIONS.
 - IV.—THE FOURTH CONTAINS GENERAL PROVISIONS
RELATING TO THE THREE PRECEDING DIVISIONS.
-

THE CIVIL CODE

OF THE

STATE OF CALIFORNIA.

PRELIMINARY PROVISIONS.

SECTION 2. When this Code takes effect.

3. Not retroactive.
4. Rules of construction.
5. Provisions similar to existing laws, how construed.
6. Actions, etc., not affected.
7. Holidays.
8. Same.
9. Business days.
10. Computation of time.
11. Certain acts not to be done on holidays.
12. Joint authority construed.
13. Words and phrases, how construed.
14. Certain terms defined.
15. Good faith, what constitutes.
16. Degrees of care and diligence.
17. Degrees of negligence.
18. Notice, actual and constructive.
19. Constructive notice, when deemed.
20. Effect of repeal.
21. This Act, how cited.

2. This Code takes effect at twelve o'clock noon, When this Code takes effect.
on the first day of January, eighteen hundred and seventy-three.

Not
retroactive.

3. No part of it is retroactive, unless expressly so declared.

NOTE.—Von Schmidt vs. Huntington, 1 Cal., p. 55; Thorne vs. San Francisco, 4 Cal., p. 127; Gates vs. Salmon, 28 Cal., p. 320; Prince vs. United States, 2 Gall., p. 204; United States vs. Heth, 3 Cranch., p. 399; Harvey vs. Tyler, 2 Wall., p. 328; Holden vs. James, 11 Mass., p. 396; Lewis vs. Webb, 3 Greenl., p. 326; Dash vs. Van Kleeck, 7 John., 474; Lewis vs. Brackenridge, 1 Black., p. 220; Smith's Commentaries, Sec. 533.

Rules of
construction.

4. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

NOTE.—The common law rule is correctly stated in the first sentence of this section.—Hoteling vs. Cronise, 2 Cal., p. 60; People vs. Buster, 11 Cal., p. 215, and Turner vs. Tuolumne Water Company, 25 Cal., p. 397. However sound may be the arguments in favor of this rule, when applied to ordinary acts of the Legislature, it is apparent that it would be improper to apply it in all its severity to a system of laws intended, in a great measure, to take the place of the common law, and having in view, as its leading object, the furtherance of justice and a disregard of technical strictness. The provisions of such a system ought to be construed in the same manner, and with like force and effect, as they would be were the principles enunciated resting in the unwritten law, and it was to this end that the section has been made part of each of the Codes.

Provisions
similar to
existing
laws, how
construed.

5. The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

Actions,
etc., not
affected.

6. No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions.

NOTE.—*McMinn vs. Bliss*, 31 Cal., p. 122; *People vs. Livingston*, 6 Wend., p. 530; *Sedgwick on S. and C. Law*, p. 679.

7. Holidays, within the meaning of this Code, are: Holidays.
every Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States or by the Governor of this State for a public fast, thanksgiving, or holiday.

8. If the first of January, the twenty-second of Same.
February, the fourth of July, or the twenty-fifth of December falls upon a Sunday, the Monday following is a holiday.

9. All other days than those mentioned in the last Business days.
two sections are to be deemed business days for all purposes.

10. The time in which any act provided by law is Computation of time.
to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

NOTE.—*Price vs. Whitman*, 8 Cal., p. 412; *Iron Mountain Company vs. Haight*, 39 Cal., p. 540; *Soldiers' Voting Bill*, 45 N. H., p. 612. Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act was done.—*Craig vs. Godfrey*, 1 Cal., p. 145; *People vs. Beatty*, 14 Cal., p. 566.

11. Whenever any act of a secular nature, other Certain acts not to be done on holidays.
than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

NOTE.—Sunday not regarded.—*McGill vs. Bank U. S.*, 12 Wheat., p. 511.

Joint
authority
construed.

12. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority.

Words and
phrases,
how
construed.

13. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

NOTE.—Quigley vs. Gorham, 5 Cal., p. 418; Sprague vs. Norway, 31 Cal., p. 173; Maillard vs. Lawrence, 16 How., p. 251. General words are controlled by specific exceptions.—Lucas vs. Payne, 7 Cal., p. 92; U. S. vs. Weiss, 2 Wall. Jr. C. Ct., p. 72. Some effect, if possible, must be given to every word, and certainly to every distinct provision.—Langenour vs. French, 34 Cal., p. 92.

Certain
terms
defined.

14. Whenever the terms mentioned in this section are employed in this Code, they are employed in the senses hereafter affixed to them, except where a different sense plainly appears:

1. The term "signature" includes any name, mark, or sign written with intent to authenticate any instrument or writing.

2. The words "writing" and "written" include "printing" and "printed," except in the case of signatures, and where the words are used by way of contrast to printing. Writing may be made in any manner, except that when a person entitled to require the execution of a writing demands that it be made with ink it must be so made.

3. The word "paper" means any flexible material upon which it is usual to write.

4. The term "writing" includes both printing and writing.

5. The term "land" and the phrases "real estate"

and "real property" include lands, tenements, and hereditaments, and all rights thereto and interests therein. Certain terms defined.

6. The words "personal property" include money, goods, chattels, evidence of debt, and "things in action."

7. The word "property" includes personal and real property.

8. The words "compound interest" mean interest added to the principal as the former becomes due, and thereafter made to bear interest.

9. The word "year" means a calendar year, and "month" a calendar month, unless otherwise expressed. Fractions of a year are to be computed by the number of months—thus, half a year is six months. Fractions of a day are to be disregarded in computations which include more than one day, and involve no questions of priority.

10. The abbreviation "A. D." is equivalent to the expression "year of our Lord."

11. The word "oath" includes "affirmation" in all cases where an affirmation may be substituted for an oath; and in like cases the word "swear" includes the word "affirm." Every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose."

12. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" include the District and Territories.

13. Where the term "person" is used to designate the party whose property may be the subject of any offense, action, or proceeding, it includes this State, any other State, Government, or country which may lawfully own any property within this State, and all

Certain
terms
defined.

public and private corporations, or joint associations, as well as individuals.

14. The word "person," except when used by way of contrast, includes not only human beings, but bodies politic or corporate.

15. The phrase "third persons" includes all who are not parties to the obligation or transaction concerning which the phrase is used.

16. The phrase "persons of unsound mind" includes idiots, lunatics, imbeciles, and habitual drunkards.

17. The term "children," includes children by birth and by adoption.

18. Words used in the singular number include the plural, and the plural the singular.

19. The word "several," as used in relation to number, means two or more.

20. Words used in the masculine gender comprehend as well the feminine and neuter.

21. Words used in the present tense include the future, but exclude the past.

22. The word "will" includes codicils.

23. The word "writ" signifies an order or precept in writing issued in the name of the people or of a Court or judicial officer. "Process" is a writ or summons issued in the course of judicial proceedings.

24. Except as used in Part II of Division IV of this Code, the word "debtor" includes within its meaning every one who owes to another the performance of an obligation, and the word "creditor" every one to whom the performance is due.

25. The words "usual" and "customary" mean according to usage.

26. The word "usage" means a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby existing at the place where the obligation is to be performed, and either known to the parties or so well

established, general, and uniform, that they must be presumed to have acted with reference thereto. Certain terms defined.

27. The word "verdict" includes not only the verdict of a jury, but also the finding upon the facts by a Judge or of a referee appointed to try the case.

28. The word "value" or the phrase "valuable consideration" means a thing of value parted with or a new obligation assumed at the time of obtaining a thing which is a substantial compensation for that which is obtained thereby.

29. When the seal of a Court, public officer, or officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

15. Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. Good faith, what constitutes.

NOTE.—Claffin vs. Farmers' and Citizens' Bank, 25 N. Y., pp. 293, 298; Starin vs. Genoa, 23 id., p. 439; Sanger vs. Easterwood, 19 Wend., p. 514; Gregory vs. Thomas, 20 id., p. 17; Dunham vs. Dey, 15 Johns., p. 569.

16. There are three degrees of care and diligence: Degrees of care and diligence.

1. Slight—which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance;

2. Ordinary—which is such as persons of ordinary prudence usually exercise about their own affairs of ordinary importance;

3. Great—which is such as persons of ordinary prudence usually exercise about their own affairs of great importance.

NOTE.—Edwards on Bailments, p. 44; Jones on Bailments, p. 118; 2 Parsons on Contracts, p. 87. For

criticisms upon the definitions and classifications of "negligence" see *Steamer New World vs. King*, 16 How., p. 469; *Blythe vs. Waterworks*, 36 E. L. & E., p. 506.

Degrees of negligence.

17. There are three degrees of negligence:

1. Slight—which consists in the want of great care and diligence;
2. Ordinary—which consists in the want of ordinary care and diligence;
3. Gross—which consists in the want of slight care and diligence.

NOTE.—See note to section 16.

Notice, actual and constructive.

18. Notice is:

1. Actual—which consists in express information of a fact; or,
2. Constructive—which is imputed by law.

Constructive notice, when deemed.

19. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, has constructive notice of the fact itself.

NOTE.—*Call vs. Hastings*, 3 Cal., p. 179. If the party who receives information of circumstances suggesting an inquiry for the principal fact, makes that inquiry with due diligence, the result must be either that he will ascertain the fact, or that he will be prevented from doing so by causes for which he is not to blame, and from which he ought not to suffer. If he ascertain it, he then has actual notice, and the doctrine of constructive notice does not apply. If, notwithstanding due diligence, he fails to ascertain it, notice ought not to be imputed to him. The Commissioners, therefore, as respects circumstances putting a person upon inquiry, have limited the doctrine of constructive notice to cases in which there is a failure to make diligent inquiry. (See *Foster vs. Beals*, 21 N. Y., p. 247; *Williamson vs. Brown*, 15 N. Y., p. 354; *Fassett vs. Smith*, 23 N. Y., p. 252). The decision in *Kellogg vs. Smith*, 26 N. Y., p. 18, is put upon the ground that there was a duty of inquiry, both for the bond and the mortgage; but the inquiry made was only as to the mortgage.

20. No statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated.

Effect of
repeal.

This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided.

NOTE.—City and County of Sacramento vs. Bird, 15 Cal., p. 295; Sedgwick on C. and S. Law, p. 124; also, note to Section 6, Civil Code.

21. This Act, whenever cited, enumerated, referred to, or amended, may be designated simply as "THE CIVIL CODE," adding, when necessary, the number of the section.

This Act,
how cited.

DIVISION FIRST.

PART I. PERSONS.

II. PERSONAL RIGHTS.

III. PERSONAL RELATIONS.

IV. CORPORATIONS.

PART I.

PERSONS.

SECTION 25. Minors, who are.

26. Periods of minority, how calculated.
27. Adults, who are.
28. Status of minors, how changed.
29. Unborn child.
30. Persons made adults by other States, considered as such in this State, when domiciled herein.
31. Minors by the laws of other State or country, how considered in this State.
32. Custody of minors.
33. Minors cannot give a delegation of power.
34. Contracts of minors made; disaffirmed.
35. When minor may disaffirm.
36. Cannot disaffirm contract for necessities.
37. Nor certain obligations.
38. Contracts of persons without understanding.
39. Contracts of other insane persons.
40. Powers of persons whose incapacity has been adjudged.
41. Minors liable for wrongs, but not liable for exemplary damages.
42. Minors may enforce their rights.

25. Minors are :

1. Males under twenty-one years of age;
2. Females under eighteen years of age.

Minors,
who are.

NOTE.—Cool. Bl. Comm., I, p. 463.

26. The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority.

Periods of
minority,
how
calculated.

NOTE.—The first second of the *preceding* day is the common law rule.—Shars. Bl. Comm., I., p. 463, and note 11.

Adults,
who are.

27. All other persons are adults.

Status of
minors,
how
changed.

28. The marriage of minors changes their status from minors to adults.

NOTE.—Stats. 1858, p. 108. The statute embraced only females; this section extends the privilege to males.

Unborn
child.

29. A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.

NOTE.—Cool. Bl. Comm., I, p. 128; Marsellis vs. Thalheimer, 2 Paige, p. 35; Jenkins vs. Freyer, 4 Paige, p. 47; Hone vs. Van Scharck, 3 Barb., Chap. 488.

Persons
made
adults by
other
States,
considered
as such in
this State,
when
domiciled
herein.

30. Persons made adults by the laws of a State or foreign country in which they were domiciled, are adults in this State when they become domiciled herein.

NOTE.—Story on Conflict of Laws, p. 52; Tyler on Infancy and Coverture, p. 35.

Minors by
the laws of
other State
or country,
how
considered
in this
State.

31. Minors by the laws of another State or foreign country, wherein they have been domiciled, are not deemed adults under this Code so as to affect or alter their rights in relation to contracts made in such State or foreign country.

NOTE.—Story on Conflict of Laws, p. 69; 2 Kent, p. 234, note C.

Custody of
minors.

32. The custody of minors and persons of unsound mind is regulated by Part III of this Division.

Minors
cannot
give a
delegation
of power.

33. A minor cannot give a delegation of power.

NOTE.—Bennett vs. Davis, 6 Cow., p. 393; Thomas vs. Roberts, 16 M. & W., p. 778. Such a delegation is absolutely void.—Bool vs. Mix, 17 Wend., p. 119; Lawrence vs. McAoter, 10 Ohio, p. 37; Pyle vs. Cravens, 4 Little, p. 17.

Contracts
of minors
made;
disaffirmed

34. A minor may make a conveyance or other contract in the same manner as any other person, subject only to his power of disaffirmance under the provis-

ions of this Title, and to the provisions of the Title on Marriage.

NOTE.—*Magee vs. Walsh*, 18 Cal., p. 155. A minor may make a promissory note, and as to him the note will not be void, but merely voidable at his election.—*Hastings vs. Dollarhide*, 24 Cal., p. 195; *Palmer vs. Miller*, 25 Barb., p. 399; *Slocum vs. Hooker*, 13 Barb., p. 536; *Bool vs. Mix*, 17 Wend., p. 119; *Gillett vs. Stanley*, 1 Hill, p. 121; *Van Nostrand vs. Wright*, Hill & D. Supp., p. 260; *Clark vs. Levi*, 10 N. Y. Leg. Obs., p. 184. It has been doubted whether a minor who has a guardian can make a contract.—*Stafford vs. Roof*, 9 Cow., pp. 626, 630; *Kline vs. L'Amoureux*, 2 Paige, p. 419; but it seems now to be settled that he can.—*Bartholomew vs. Finnemore*, 17 Barb., p. 428. A confession of judgment by an infant is void.—*Saunderson vs. Marr*, 1 H. Black, p. 75; *Bennett vs. Davis*, 6 Cowen, p. 394; *Waples vs. Hastings*, 3 Harring. (Del.), p. 403; *Knox vs. Flack*, 22 Penn. St., p. 337. So too is his *cognovit* for the same purpose, although the action was wholly for necessities.—*Oliver vs. Woodruffe*, 4 M. & W., p. 650; or his bond with a penalty, or for the payment of interest.—*Baylis vs. Dinely*, 3 M. & Sel., p. 477; *Hunter vs. Agnew*, 1 Fox & S., p. 15; *Colcock vs. Ferguson*, 3 Desaus., p. 482; or a release by a female infant to a guardian.—*Fridge vs. The State*, 3 G. & J., p. 104; or an infant's contract of suretyship.—*Wheaton vs. East*, 5 Yerg., pp. 41-61; *Allen vs. Minor*, 2 Cal., p. 70. Per contra, *Hinely vs. Margaritz*, 3 Burr, p. 428; or his release of a legacy or distributive share in an estate.—*Langford vs. Fry*, 8 Humph, p. 443.

35. In all cases other than those specified by Sections 36 and 37, the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, or, in case of his death within that period, by his heirs or personal representatives.

When
minor may
disaffirm.

NOTE.—*Conroe vs. Birdsall*, 1 Johns. Cas., p. 127; *Brown vs. McCune*, 5 Sandf., p. 224; *Merriam vs. Cunningham*, 11 Cushing, p. 40; *Bartholomew vs. Finnemore*, 17 Barb., p. 428; *Taft vs. Sergeant*, 18 Barb., p. 320; *Bac. Abr.*, Infant, I, p. 6; 8 Co., 42 b. An infant grantor can neither affirm nor disaffirm a conveyance

of land made during non-age until he attains the age of legal majority.—*Hastings vs. Dollarhide*, 24 Cal., p. 195. What amounts to a disaffirmance.—*Id.* Conveyance, once ratified, cannot be disaffirmed.—*Id.* Ratification may be express or by implication.—*Id.* The doctrine of estoppel has no application to infants.—*Lackman vs. Wood*, 25 Cal., p. 147; *Mahoney vs. Van Winkle*, 21 Cal., p. 552. Judgments against minors—*Joyce vs. Joyce*, 5 Cal., p. 161; *Regla vs. Martin*, 19 Cal., p. 463; *Joyce vs. McAvoy*, 31 Cal., p. 273.

Cannot
disaffirm
contract for
necessaries

36. A minor, or a person of unsound mind of whatever degree, cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or for that of his family, entered into by him when not under the care of a parent or guardian able to provide for him.

NOTE.—*Ingraham vs. Baldwin*, 9 N. Y., p. 45; *Smith vs. Oliphant*, 2 Sandf., p. 306; *Randall vs. Sweet*, 1 Den., p. 460; *Turner vs. Frisby*, Strange, p. 168; *Wailing vs. Toll*, 9 Johns., p. 141; *Kline vs. L'Amoureux*, 2 Paige, p. 418; *Bent vs. Manning*, 10 Vt., p. 225; *Beeler vs. Young*, 1 Bibb., p. 519; *Grace vs. Hale*, 2 Humph., p. 27; *Stanton vs. Wilson*, 3 Day, p. 37; *Phelps vs. Worcester*, 11 N. H., p. 51; *Tupper vs. Caldwell*, 12 Met., p. 559.

Nor certain
obligations.

37. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

Contracts
of persons
without
under-
standing.

38. A person entirely without understanding has no power to contract, except in the case mentioned in Section 36, unless expressly authorized by statute.

NOTE.—*Jackson vs. King*, 4 Cow., p. 207; 1 Parson on Contracts, p. 383.

Contracts
of other
insane
persons.

39. A person of unsound mind, but not entirely without understanding, may make a conveyance or other contract before his incapacity has been judicially determined, subject to rescission, as provided in the Chapter on Rescission.

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NOTE.—*Jackson vs. King*, 4 Cow., p. 207; *Person vs. Warren*, 14 Barb., p. 488; *Odell vs. Buck*, 21 Wend.,

p. 142. Thus a mortgage by a lunatic is at most voidable.—*Ingraham vs. Baldwin*, 9 N. Y., p. 45; 12 Barb., p. 9. The mere existence of lunacy does not revoke a power.—*Wallis vs. Manhattan Co.*, 2 Hall, p. 495. Compare, however, the change in the law of Agency. As to the cases in which such a contract should be set aside, see *Sprague vs. Duel*, 11 Paige, p. 480; *Loomis vs. Spencer*, 2 id., p. 153. An administrator may avoid a contract by showing the insanity of the testator at the time of making it.—*Lazell vs. Pinnick*, 1 Tyler, p. 247.

40. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined.

Powers of persons whose incapacity has been adjudged.

NOTE.—*Fitzhugh vs. Wilcox*, 12 Barb., p. 235; *Wadsworth vs. Sherman*, 14 Barb., p. 69.

41. A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful.

Minors liable for wrongs, but not liable for exemplary damages.

NOTE.—*Fish vs. Ferris*, 5 Duer, p. 49; *Campbell vs. Stakes*, 2 Wend., p. 139; *Hartfield vs. Roper*, 21 id., p. 615; *Green vs. Burke*, 23 id., p. 490; *Bullock vs. Babcock*, 3 id., p. 391; *Wallace vs. Morss*, 5 Hill, p. 391; *Conklin vs. Thompson*, 29 Barb., p. 218; *Burnard vs. Haggis*, 14 C. B. (N. S.), p. 45; *Krom vs. Schoonmaker*, 3 Barb., p. 647; see *Williams vs. Cameron*, 26 id., p. 172.

42. A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same.

Minor may enforce their rights

PART II.

PERSONAL RIGHTS.

SECTION 43. General personal rights.

44. Defamation, what.
45. Libel, what.
46. Slander, what.
47. What communications are privileged.
48. Malice not inferred.
49. Protection to personal relations.
50. Right to use force.

43. Besides the personal rights mentioned or recognized in the POLITICAL CODE, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

General
personal
rights.

NOTE.—There is no doubt that persistent public insults, *e. g.*, continually shouting at a person in the street, or even silently dogging him, are personal injuries, against which he ought to be protected. Why is not an act which the law admits *almost* to justify, certainly to mitigate, the crime of assault and battery, sufficient foundation for a civil action? Compare *Adams vs. Rivers*, 11 Barb., p. 390, where an action for use of insulting words, by one standing in the highway in front of plaintiff's land, was sustained on the ground of the trespass involved in standing in the highway after being ordered to depart, for the malicious purpose evinced.

44. Defamation is affected by:

1. Libel;
2. Slander.

Defama-
tion, what.

Libel,
what.

45. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

NOTE.—Cool. Bl. Comm., I, p. 133; *ib.*, III, p. 125; 2 Kent Com., p. 17; *Thrall vs. Smiley*, 9 Cal., p. 530; *Maynard vs. Fireman's Fund Insurance Co.*, 34 Cal., p. 48; *Stone vs. Cooper*, 2 Den., p. 293; *Cooper vs. Greely*, 1 Den., p. 347; *Steele vs. Southwick*, 9 Johns., p. 214; *Villers vs. Mousley*, 2 Wils., p. 403; *Miller vs. Butler*, 6 Cush., p. 71; *Hagan vs. Hendry*, 18 Ind., p. 177; *Steele vs. Southwick*, 9 Johns., p. 211; 1 Hilliard on Torts, p. 237. In all definitions of libel or slander at common law, malice is treated as a necessary ingredient. But in the absence of a proper motive for the publication, malice is conclusively presumed, and the publisher of a libel is responsible, although clearly free from actual malice.—*Hunt vs. Bennett*, 19 N. Y., p. 173; *Lewis vs. Chapman*, 16 id., p. 369.

Slander,
what.

46. Slander is a false and unprivileged publication other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;

4. Imputes to him impotence or a want of chastity; or,

5. Which, by natural consequence, causes actual damage.

NOTE.—Cool. Bl. Comm., I, p. 153; *ib.*, III, p. 123; *McDaniel vs. Baca*, 2 Cal., p. 326; *Butler vs. Howes*, 7 Cal., p. 87; *Bradley vs. Gardner*, 10 Cal., p. 371;

Scott vs. Harbor, 18 Cal., p. 704; Williams vs. Hordredge, 22 Barb., p. 376; Lynch vs. Knight, 9 H. L. Cas., p. 577; Brooker vs. Coffin, 5 Johns., p. 188; McKewen vs. Ludlow, 2 Harr., p. 12; 1 Hilliard on Torts, p. 228.

47. A privileged publication is one made:

1. In the proper discharge of an official duty;
2. In testifying as a witness in any proceeding authorized by law to a matter pertinent and material, or in reply to a question allowed by the tribunal.

What communications are privileged.

3. In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, or who was requested by him to give the information;

4. By a fair and true report in a newspaper, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

NOTE.—Perkins vs. Mitchell, 31 Barb., p. 461; Lewis vs. Chapman, 16 N. Y., p. 369; Thorn vs. Moser, 1 Denio, p. 488; 1 Hilliard on Torts, p. 317.

48. In the cases provided for in Subdivisions 3 and 4 of the preceding section, malice is not inferred from the communication or publication.

Malice not inferred.

49. The rights of personal relation forbid:

1. The abduction of a husband from his wife, or of a parent from his child;

Protection to personal relations.

2. The abduction or enticement of a wife from her husband, of a child from a parent or from a guardian entitled to its custody, or of a servant from his master;

3. The seduction of a wife, daughter, orphan sister, or servant;

4. Any injury to a servant which affects his ability to serve his master.

NOTE.—Cool. Bl. Comm., III, pp. 138-141. Perhaps the provision in Subdivision 1 is new, and doubtless as a matter of fact it would rarely be taken advantage of.

tage of. Nevertheless, the injury is a very great one, and one, unhappily, not entirely unknown. *Bennett vs. Smith*, 21 Barb., p. 439; *Scherpf vs. Sczadeczky*, 4 E. D. Smith, p. 110; see *People vs. Olmstead*, 27 Barb., p. 9; *Lumley vs. Gye*, 2 Ell. & Bl., p. 216. The provision in Subdivision 3 is new, as to the sister and daughter. *Dain vs. Wyckoff*, 7 N. Y., p. 191. The legal fiction by which the action of seduction has long been sustained has always been considered too narrow for the purposes of justice. *Woodward vs. Washburn*, 3 Den., p. 369; *Martinez vs. Gerber*, 3 M. & G., p. 88.

Right to
use force.

50. Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative to the third degree, a ward, servant, or master.

NOTE.—*Roll. Abr.*, Trespass, D.; *Leeward vs. Basile*, 1 Salk., p. 407; *Seaman vs. Cuppledick*, Owen, p. 150; *Blades vs. Higgs*, 10 C. B. (N. S.), p. 713.

PART III.

PERSONAL RELATIONS.

TITLE I. MARRIAGE.

- II. PARENT AND CHILD.
 - III. GUARDIAN AND WARD.
 - IV. MASTER AND SERVANT.
-

TITLE I.

MARRIAGE.

- CHAPTER I. *The Contract of Marriage.*
 - II. *Divorce.*
 - III. *Husband and Wife.*
-

CHAPTER I.

THE CONTRACT OF MARRIAGE.

- ARTICLE I. VALIDITY OF MARRIAGE.
 - II. AUTHENTICATION OF MARRIAGE.
-

ARTICLE I.

VALIDITY OF MARRIAGE.

- SECTION 55. What constitutes marriage.
- 56. Minors capable of contracting marriage.
- 57. Marriage, how manifested and proved.

SECTION 58. Certain marriages voidable.

- 59. Incompetency of parties to.
- 60. Of whites and negroes or mulattoes, void.
- 61. Polygamy forbidden.
- 62. Released from marriage contract, when.
- 63. Marriages contracted without the State.

What
constitutes
marriage.

55. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations.

NOTE.—Const. of Cal., Art. XI, Sec. 12; *Townsend vs. Griffin*, 4 Harring. (Del.), p. 440; *Maguire vs. Maguire*, 7 Dana, p. 181; *Dickson vs. Dickson*, 1 Serg., p. 110; *Holmes vs. Holmes*, 6 La., p. 463; *Cool. Bl. Comm.*, I, p. 433 and note 2, and p. 437. "Marriage," says Mr. Bishop, in his work on *Marriage and Divorce* (Volume I, Section 3), "is the civil status of one man and one woman united in law for life, under obligations to discharge to each other and the community those duties which the community, by its laws, holds incumbent on persons whose association is founded on the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations. And since it can exist only in pairs, and since none are compelled, but all who are capable are permitted, to assume it, marriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity."

In *Graham vs. Bennett*, 2 Cal., p. 503, it is held that "an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding."

Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage.—*Letters vs. Cady*, 10 Cal., p. 533.

As to whether consent alone constitutes marriage: in *Jewell's Heirs vs. Jewell*, 1 How., p. 219, the Court was equally divided. In *Regina vs. Millis*, 10 Jeb. and Fin., p. 534, the House of Lords, on appeal from Ireland, was also equally divided on the same question—*Lords Brougham, Denman, and Campbell* in favor, and *Lords Lynhurst, Coltenham, and Abinger* against it. On reference of the question to the Court, *Tindel*,

C. J., gave the unanimous opinion of the Court that it was *not* a valid marriage, and held "that by the law of England, as it existed at the time of the Marriage Act, a contract of marriage *per verba de praesenti* was indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law."—2 Parsons on Contracts, p. 78 and notes.

56. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

Minors
capable of
contracting
marriage.

NOTE.—At common law the age of consent is fourteen for the male and twelve for the female.—Co. Lit., p. 78 b; Parton vs. Hervey, 1 Gray, p. 119. The rule of the common law was borrowed, perhaps, from the Roman law, with which it agrees.—2 Parsons on Contracts, p. 82. At common law, if the marriage took place when one was of sufficient age (as the husband of fifteen) and the other within the age of consent (as the wife of ten), when the wife reaches the age of twelve the husband may disagree, and annul the marriage.—Co. Lit., p. 79 b.

57. Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

Marriage,
how
manifested
and proved

NOTE.—Letters vs. Cady, 10 Cal., p. 533; Case vs. Case, 17 Cal., p. 598; Starr vs. Peck, 1 Hill., p. 270; Clayton vs. Wardell, 4 N. Y., p. 230; Jewell vs. Jewell, 1 How., p. 219. Proof that a man and woman had cohabited together for a long time as husband and wife, had mingled in society as such, and represented each other as such, is admissible for the purpose of proving a marriage; and, in the absence of evidence to the contrary, conclusive as such in all cases except in actions of *crim. con.*, divorce, indictments for big-

amy, and like cases, where the marriage is the foundation of the claim to be enforced.—*People vs. Anderson*, 26 Cal., p. 129; *Read vs. Passer*, 1 Esp., p. 213; *Hervey vs. Hervey*, 2 W. Bl., p. 877; *Leader vs. Barry*, 1 Eps., p. 253; *Morris vs. Miller*, 4 Burr, p. 2058; *Northfield vs. Vershire*, 33 Vt., p. 110; *Niles vs. Sprague*, 13 Iowa, p. 198; *Crawford vs. Blackburn*, 17 Md., p. 49; *Fenton vs. Reed*, 4 Johns., p. 52.

Certain
marriages
voidable.

58. If either party to a marriage is incapable of consent, for want of age or understanding; or, from physical causes, of entering into the marriage state; or if such consent is obtained by fraud or force, the marriage is voidable.

NOTE.—Marriage may be avoided for material and substantive fraud in its procurement. Ante-nuptial pregnancy by a stranger is a fraud going to the very substance of the contract.—*Baker vs. Baker*, 13 Cal., p. 87. Force or fraud avoids the marriage, but the force or fraud must be certain and extreme.—*Dalrymple vs. Dalrymple*, 2 Hagg. Cons., p. 104; *Sullivan vs. Sullivan*, 2 Hagg. Cons., p. 246.

Incompe-
tency of
parties to.

59. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.

Of whites
and negroes
or
mulattoes,
void.

60. All marriages of white persons with negroes or mulattoes are illegal and void.

Polygamy
forbidden.

61. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage had been annulled or dissolved; or,

2. Unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding

such subsequent marriage; in which case the subsequent marriage is void only from the time its nullity is adjudged by a competent tribunal.

NOTE.—Cool. Bl. Comm., I., p. 435; *Bowers vs. Bowers*, 9 N. Y. Lg. Ols.

62. Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other.

Released from marriage contract, when.

NOTE.—*Beachy vs. Brown*, El. Bl. & E., p. 976; *Baker vs. Cartright*, 10 C. B. (N. S.), p. 124; *Palmer vs. Andrews*, 7 Wend., p. 142.

63. All marriages contracted without this State, which would be valid by the laws of the country in which the same were contracted, are valid in this State.

Marriages contracted without the State.

NOTE.—This is the common law rule.—1 Bishop on Marriage and Divorce, Sec. 353; *Stevenson vs. Gray*, 17 B. Mon. p. 193; *Simonin vs. Mallac*, 2 Swab and T., pp. 67-83. The general principle is, that a marriage valid by the laws of the country in which it is celebrated, though the parties are but transient persons, though it would be invalid entered into with the same formalities in the place of their domicile, and even though contracted in express evasion of their own law, is good everywhere.—1 Bishop on Marriage and Divorce, Sec. 355; *Story Conf. Laws*, Secs. 79-81; *Compton vs. Bearcroft*, Bul. N. P., p. 114; *Sutton vs. Warren*, 10 Met., p. 451; *Swift vs. Kelly*, 3 Knapp, p. 257; *Patterson vs. Gaines*, 6 How. U. S., p. 550; *State vs. Patterson*, 2 Iredell, p. 346, and *Wall vs. Williamson*, 8 Ala., p. 48, where the rule was held to apply to marriages contracted in an Indian nation.

ARTICLE II.

AUTHENTICATION OF MARRIAGE.

SECTION 68. Marriage, how solemnized.

69. Marriage license.

70. By whom solemnized.

71. No particular form of solemnization.

72. Substantial requisites.

SECTION 73. Certificate of marriage.

74. Certificate to parties and Recorder.

75. Declaration of marriage, how made.

76. Declaration to contain what.

77. To be acknowledged and recorded.

78. Action between the parties to determine validity.

Marriage,
how sol-
emnized.

68. Marriage must be licensed, solemnized, authenticated, and recorded as provided in this Article; but non-compliance with its provisions does not invalidate any lawful marriage.

NOTE.—Graham vs. Bennett, 2 Cal., p. 503; Londonderry vs. Chester, 2 N. H., p. 268; Newberry vs. Brunswick, 2 Vt., p. 131; Lacin vs. Higgins, 3 Stark, p. 178; Dumaralsey vs. Fishley, 3 A. K. Marsh, p. 368; Rex vs. Birmingham, 8 B. & C., p. 29; Hargroves vs. Thompson, 31 Missis., p. 211; Park vs. Barron, 20 Ga., p. 702; Ferrie vs. Pub. Adms., 4 Bradf., p. 28; 1 Bishop on Marriage and Divorce, Sec. 283. See note to Section 57.

Marriage
license.

69. All persons about to be joined in marriage must first obtain a license therefor from the Clerk of the County Court of the county in which the marriage is to be celebrated, showing:

1. The identity of the parties;
2. Their real and full names and places of residence;
3. That they are of sufficient age to be capable of contracting marriage;
4. If the male is under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother, or guardian, if any such, is given; or that such non-aged person has been previously, but is not at the time, married.

For the purpose of ascertaining these facts, the Clerk is authorized to examine parties and witnesses on oath, and receive and read affidavits. He must state such facts in the license.

By whom
solemnized

70. Marriage may be solemnized by either a Justice of the Supreme Court, District or County Judge,

Justice of the Peace, Mayor, priest, or minister of the gospel of any denomination.

71. No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife.

No particular form of solemnization.

NOTE.—No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.—Cal. Const., Art. XI, Sec. 12.

72. The person solemnizing a marriage must first require the presentation of the marriage license, and satisfy himself that it substantially conforms to Section 69, and that the facts set forth in it are true. For this purpose he may rely upon the license or may administer oaths and examine the parties and witnesses in like manner as the County Clerk does before issuing the license.

Substantial requisites.

73. The person solemnizing a marriage must make, sign, and indorse upon or attach to the license a certificate, showing:

Certificate of marriage

1. That he believes the facts stated to be true, and that upon due inquiry there appears to be no legal impediment to the marriage;

2. The names and places of residence of one or more witnesses to the ceremony;

3. The fact, time, and place of solemnization.

74. He must, at the request of, and for either party, make a certified copy of the license and certificate, and file the originals with the County Recorder within thirty days after the marriage.

Certificate to parties and Recorder.

75. Persons married without the solemnization provided for in Section 70 must jointly make a declaration of marriage, substantially showing:

Declaration of marriage, how made.

1. The names, ages, and residence of the parties;
2. The fact of marriage;
3. The time of marriage;
4. That the marriage has not been solemnized.

Declara-
tion to
contain
what.

76. If no record of the solemnization of a marriage is known to exist, the parties may join in a declaration of such marriage, substantially showing:

1. The names, age, and residence of the parties;
2. The fact of marriage;
3. That no record of such marriage is known to exist.

To be
acknowl-
edged and
recorded.

77. Declarations of marriage must be acknowledged and recorded in like manner as grants of real property.

Action
between
the parties
to
determine
validity.

78. If either party to any marriage denies the same, or refuses to join in a declaration thereof, the other may proceed, by action in the District Court, to have the validity of the marriage determined and declared.

CHAPTER II.

DIVORCE.

ARTICLE I. NULLITY.

II. DISSOLUTION.

III. CAUSES FOR DENYING DIVORCE.

IV. GENERAL PROVISIONS.

ARTICLE I.

NULLITY.

SECTION 82. Cases where marriage may be annulled.

83. Action to obtain decree of nullity in certain cases, when and by whom commenced.
84. Children of annulled marriage.
85. Custody of children.
86. Effect of judgment of nullity.

82. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

Cases where marriage may be annulled.

1. That the party seeking to have the marriage annulled was under the age of legal consent; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife;

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force;

3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband or wife;

4. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife;

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife;

6. That either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable.

NOTE.—1 Cool. Bl. Comm., pp. 435-440. Antenuptial fraud, *Baker vs. Baker*, 13 Cal., p. 87. Previous marriage, *Fuller vs. Fuller*, 17 Cal., p. 605. *Devanbaugh vs. Devanbaugh*, 5 Paige, p. 554; 6 Paige, p. 175.

83. An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows:

Action to obtain decree of nullity in certain cases, when and by whom commenced.

1. For causes mentioned in Subdivision 1: by either party to the marriage, or by a guardian or relative, within four years after arriving at the age of consent;

2. For causes mentioned in Subdivision 2: by either

Same. party during the life of the other, or by such former husband or wife;

3. For causes mentioned in Subdivision 3: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party;

4. For causes mentioned in Subdivision 4: by the party injured, within four years after the discovery of the facts constituting the fraud;

5. For causes mentioned in Subdivision 5: by the injured party, within four years after the marriage;

6. For causes mentioned in Subdivision 6: by the injured party, within four years after the marriage.

Children of,
annulled
marriage.

84. Where a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate, and succeed to the estate of both parents.

NOTE.—Graham vs. Bennett, 2 Cal., p. 503.

Custody of
children.

85. The Court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

Effect of
judgment
of nullity.

86. A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

ARTICLE II.

DISSOLUTION OF MARRIAGE.

SECTION 90. Marriage, how dissolved.

91. Divorce, what.

92. Causes for divorce.

93. Adultery defined.

94. Extreme cruelty, what.

95. Desertion, what.

SECTION 96. Desertion, how manifested.

97. In case of stratagem or fraud, who commits desertion.
98. In case of cruelty, where one party leaves the other, who commits desertion.
99. Separation by consent not desertion.
100. Separation and intent to desert not always coincident.
101. Consent to separate revocable.
102. Desertion, how cured. Effect of refusing condonation.
103. Wife must abide by husband's selection of home, or it is desertion on her part.
104. If the place is unfit, and wife refuses to conform, it is desertion by the husband.
105. Willful neglect, what.
106. Habitual intemperance, what.
107. Habitual intemperance for one year.

90. Marriage may be dissolved:

Marriage,
how
dissolved.

1. By the death of either of the parties; or,
2. By a divorce adjudged by a Court of competent jurisdiction.

91. Divorce is a judgment dissolving the marriage and restoring the parties to the status of unmarried persons.

Divorce,
what.

NOTE.—Divorces were sanctioned by the Mosaic law. It is said (Deuteronomy, chapter xxiv: verses 1, 2, 3, and 4) that:

“1. When a man hath taken a wife and married her, and it come to pass that she find no favor in his eyes because he hath found some uncleanness in her, then let him write her a bill of divorcement and give it in her hand, and send her out of his house;

“2. When she has departed out of his house, she may go and be another man's wife;

“3. And if the latter husband hate her, and write her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die which took her to be his wife;

“4. Her former husband which sent her away may not take her again to be his wife, after that she is defiled, for that is an abomination before the LORD; and thou shalt not cause the land to sin which the LORD thy God giveth thee for an inheritance.”

See, also, Matthew v: 31; Mark x: 4.

The Roman law, from the earliest period, permitted divorces pretty much at the pleasure of either party.—Rees' Cyc., Art. Divorce; Head vs. Head,

2 Kelly, p. 191; Taylor Civ. Law, p. 359; 2 Kent's Com., p. 103. In England, until 1857, no authority existed in any of the Judicial Courts to grant a divorce; the subject belonged to the Ecclesiastical Courts, which granted divorces from "bed and board" and pronounced sentences of nullity, but they had no power to dissolve a marriage valid and binding in its origin for causes arising subsequent to its solemnization, Parliament alone exercising that power.—2 Burns' Eccl. Law, p. 202; McQueen, Parl. Pract., p. 470. By the statute of 20 and 21 Vict. (1857), Ch. VIII, a Court was created called "The Court for Divorce and Matrimonial Causes," upon which was conferred all jurisdiction over matrimonial matters then vested in the Ecclesiastical Courts, or theretofore exercised by Parliament. In the United States it was once common for the State Legislatures, like the English Parliament, to grant divorces by special Act, but it is believed that at the present time the power to grant divorces is conferred by statute in all of the States upon Courts of equity, or Courts possessing equity powers. Section 26, Article IV, of the Constitution of California, prohibits, in express terms, the Legislature from granting divorces; and a similar provision exists in the Constitutions of many other States of the Federal Union.

Causes for
divorce.

92. Divorces must be granted for any of the following causes:

1. Adultery;
2. Extreme cruelty;
3. Willful desertion;
4. Willful neglect;
5. Habitual intemperance;
6. Conviction of felony.

Adultery
defined.

93. Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.

NOTE.—Unlawful voluntary sexual intercourse between two persons, one of whom at least is married, is the essence of the offense. It is sufficient if either party is married; the offense of the married party will be adultery, and that of the unmarried fornication.—1 Leate's Penn., p. 6; 2 Dall. Penn., p. 125. In Massachusetts, however, by statute, and in some of the other States, if the woman be married, though the man be

unmarried, he is guilty of adultery; 21 Pick., p. 509; 2 Blackf., p. 318; 18 Ga., p. 264; 9 N. H., p. 515. In Connecticut and some other States it seems that to constitute the offense of adultery the woman should be married. Adultery is not by itself indictable at common law.—4 Black Com., p. 65; 5 Rand., p. 627; but is left to the ecclesiastical Courts for punishment.

94. Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage. Extreme cruelty, what.

NOTE.—Johnson vs. Johnson, 14 Cal., p. 459; Wand vs. Wand, 14 Cal., p. 512; Morris vs. Morris, 14 Cal., p. 76; Mahone vs. Mahone, 19 Cal., p. 626; Powelson vs. Powelson, 22 Cal., p. 358; Eidenmuller vs. Eidenmuller, 37 Cal. p. 364; Evans vs. Evans, 1 Hag. Con., p. 35; Waring vs. Waring, 2 Phillim., p. 132; Perry vs. Perry, 2 Paige, p. 501; Dysart vs. Dysart, 1 Robertson, p. 407; Butler vs. Butler, 1 Parsons, p. 329; Harratt vs. Harratt, 7 N. H., p. 196; Smedley vs. Smedley, 30 Ala., p. 714; Shurman vs. Shurman, 18 Texas, p. 521; Eshbach vs. Eshbach, 11 Harris Pa., p. 343; Shaw vs. Shaw, 17 Conn., p. 189; Johnson vs. Johnson, 4 Wis., p. 135.

95. Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert. Desertion, what.

NOTE.—Conant vs. Conant, 10 Cal., p. 249; Hardenberg vs. Hardenberg, 14 Cal., p. 654; Morrison vs. Morrison, 20 Cal., p. 431; Benkert vs. Benkert, 32 Cal. p. 467; 1 Bishop on Marriage and Divorce, Sec. 776.

96. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion. Desertion, how manifested.

97. When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling place, or to be absent, and during such absence the offending party departs with intent to desert the In case of stratagem or fraud, who commits desertion.

other, it is desertion by the party committing the stratagem or fraud, and not by the other.

NOTE.—Bishop on Marriage and Divorce, Sec. 784.

In case of
cruelty,
where one
party
leaves the
other, who
commits
desertion.

98. Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party.

NOTE.—This section is intended to settle a question discussed as doubtful in Bishop on Marriage and Divorce, Secs. 787, 791, 794.

Separation
by consent
not
desertion.

99. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

NOTE.—Crow vs. Crow, 23 Ala., p. 583; Gray vs. Gray, 15 Ala., p. 779; Vanleer vs. Vanleer, 1 Harris Pa., p. 211; Ward vs. Ward, 1 Swab. & T., p. 185; Fulton vs. Fulton, 36 Missis., p. 517; McKay vs. McKay, 6 Grant U. C. Ch., p. 380.

Separation
and intent
to desert
not always
coincident.

100. The separation and intent to desert are not always coincident. Temporary absence or separation, proper in itself, may be converted into desertion whenever the intent to desert is fixed during such absence or separation.

NOTE.—The mere absence of the husband on business is not desertion.—Ex parte Aldrige, 1 Swab. & T., p. 88. Desertion cannot be inferred against either from the mere unaided fact of their not living together.—Jones vs. Jones, 13 Ala., p. 145; Gaines vs. Gaines, 9 B. Monroe, p. 205; Butler vs. Butler, 1 Parsons, p. 329; Stokes vs. Stokes, 1 Mo., 320; Pidge vs. Pidge, 3 Met., p. 257; Van Voorhees vs. Van Voorhees, Wright, p. 636; McCoy vs. McCoy, 3 Ind., p. 555; Cook vs. Cook, 2 Beasley, p. 263. But protracted absence, with other circumstances, may establish the original intent.—Ahrenfeldt vs. Ahrenfeldt, 1 Hoffman, p. 47.

Consent to
separate
revocable.

101. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith,

seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.

NOTE.—Bish. on Mar. and Div., Sec. 786; Benkert vs. Benkert, 32 Cal., p. 467.

102. If one party deserts the other, and before the expiration of the statutory period required to make the desertion complete, truly repents, returns, and offers, in good faith, to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation, it is desertion by such party from the time of refusal.

Desertion,
how cured.

Effect of
refusing
condona-
tion.

NOTE.—Bish. on Mar. and Div., Sec. 786; Benkert vs. Benkert, 32 Cal., p. 467.

103. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

Wife must
abide by
husband's
selection of
home, or it
is desertion
on her part.

NOTE.—Hardenberg vs. Hardenberg, 14 Cal., p. 654.

104. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.

If the place
is unfit, and
wife refuses
to conform,
it is
desertion
by the
husband.

105. Willful neglect is the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation.

Willful
neglect,
what.

NOTE.—Washburn vs. Washburn, 9 Cal., p. 475.

106. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

Habitual
intempe-
rance, what

NOTE.—Mahone vs. Mahone, 19 Cal., p. 626; Bish. on Mar. and Div., Sec. 813.

Habitual
intemper-
ance for
one year.

107. Willful desertion, willful neglect, or habitual intemperance must continue for one year before either is a ground for divorce.

ARTICLE III.

CAUSES FOR DENYING DIVORCE.

- SECTION 111. Divorces denied, on showing what.
- 112. Connivance, what.
 - 113. Corrupt consent, how manifested.
 - 114. Collusion, what.
 - 115. Condonation, what.
 - 116. Requisites to condonation.
 - 117. Condonation implies what.
 - 118. Evidence of condonation.
 - 119. Condonation, when operates to bar divorce.
 - 120. Concealment of facts in certain cases makes condonation void.
 - 121. Condonation, how revoked.
 - 122. Recrimination, what.
 - 123. Condonation in a recriminatory defense a bar to such defense, when.
 - 124. Divorces denied, when.
 - 125. Lapse of time establishes certain presumptions.
 - 126. Presumptions may be rebutted.
 - 127. Limitation of time.
 - 128. Divorces granted, when.
 - 129. Proof of actual residence required. Presumptions do not apply.
 - 130. Divorce not to be granted by default, etc.

Divorces
denied, on
showing
what.

111. Divorces must be denied upon showing:

- 1. Connivance; or,
- 2. Collusion; or,
- 3. Condonation; or,
- 4. Recrimination; or,
- 5. Limitation and lapse of time.

Conni-
vance, what

112. Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce.

NOTE.—Forster vs. Forster, 1 Hag. Con., p. 144;
Peirce vs. Peirce, 3 Pick., p. 299; Phillips vs. Phillips,

1 Robertson, p. 144; 2 Bishop on Marriage and Divorce, Sec. 5.

113. Corrupt consent is manifested by passive permission, with intent to connive at or actively procure the commission of the acts complained of.

Corrupt
consent,
how
manifested

NOTE.—Hoar vs. Hoar, 3 Hag. Ec., p. 137; Moorson vs. Moorson, 3 Hag. Ec., p. 87; Phillips vs. Phillips, 10 Jur., p. 829; 2 Greenleaf on Ev., Sec. 51.

114. Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in Court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

Collusion,
what.

NOTE.—Crewe vs. Crewe, 1 Hag. Ec., p. 123; Jessop vs. Jessop, 2 Swab. & T., p. 301; 1 Fras. Dom. Rel., p. 708; 2 Bishop on Marriage and Divorce, Sec. 28.

115. Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.

Condonation,
what.

NOTE.—Benkert vs. Benkert, 32 Cal., p. 467; Ferrers vs. Ferrers, 1 Hag. Con., p. 130; Worsley vs. Worsley, 2 Lee, p. 572; Smith vs. Smith, 4 Paige, p. 432; Johnson vs. Johnson, 4 Paige, p. 460; Quincy vs. Quincy, 10 N. H., p. 272; Anonymous, 6 Mass., p. 147.

116. The following requirements are necessary to condonation:

Requisites
to condonation.

1. A knowledge on the part of the condoner of the facts constituting the cause of divorce;

2. Reconciliation and remission of the offense by the injured party;

3. Restoration of the offending party to all marital rights.

NOTE.—Durant vs. Durant, 1 Hag. Ec., p. 733; Keats vs. Keats, 1 Swab. & T., p. 334; 2 Bishop on Marriage and Divorce, Sec. 38.

117. Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness.

Condonation
implies
what.

NOTE.—*Davis vs. Davis*, 19 Ill., p. 334; *D'Aguilar vs. D'Aguilar*, 1 Hag. Ec., p. 773; *Johnson vs. Johnson*, 4 Paige, p. 460; *Whispel vs. Whispel*, 4 Barb., p. 217; *Burr vs. Burr*, 10 Paige, p. 20; *Langdon vs. Langdon*, 25 Vt., p. 678; *Harrison vs. Harrison*, 20 Ala., p. 629; *Gardner vs. Gardner*, 2 Gray, p. 434; *Nogees vs. Nogees*, 7 Texas, p. 538.

Evidence of
condonation.

118. Where the cause of divorce consists of a course of offensive conduct covering the prescribed statutory period, or arising, in case of cruelty, from successive acts of ill treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any part of the facts or period constituting such causes, unless accompanied by an express agreement to condone.

NOTE.—*Westmeath vs. Westmeath*, 2 Hag. Ec. Supp., pp. 1-4; *Eng. Ec.*, pp. 233-290; *Fras. Dom. Rel.*, p. 462; 2 *Bishop on Marriage and Divorce*, Sec. 50.

Condonation, when
operates to
bar
divorce.

119. In cases mentioned in the last section, only after the cause of divorce has become complete, as to the acts complained of and the period of their continuance, can condonation be made. Even then, further efforts to live with and reform the offending party must not, unsupported by an express agreement of condonation made without undue influence, be construed as evidence of condonation.

NOTE.—“Though such party might be willing to give the other a fair trial of future matrimonial fidelity, if sure of retaining his remedy,” yet would not if the remedy was in danger of being lost in such trial.—2 *Bishop on Marriage and Divorce*, Sec. 63.

Concealment of
facts in
certain
cases
makes
condonation
void.

120. A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation.

NOTE.—*Dempster vs. Dempster*, 2 Swab. & T., pp. 438-44; 2 *Bishop on Marriage and Divorce*, Secs. 65-66.

121. Condonation is revoked and the original cause of divorce revived:

Condonation, how revoked.

1. When the condonee commits acts constituting a like or other cause of divorce; or,

2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled.

NOTE.—Palmer vs. Palmer, 2 Swab & T., pp. 61-62; Bish. on Mar. and Div., Sec. 64; Durant vs. Durant, 1 Hag. Ec., p. 773, 3 Eng. Ec., p. 310; D'Aguilar vs. D'Aguilar, 1 Hag. Ec., p. 773, 3 Eng. Ec., p. 329; Bramwell vs. Bramwell, 3 Hag. Ec., p. 618; Johnson vs. Johnson, 4 Paige, p. 460; Benkert vs. Benkert, 32 Cal., p. 467.

122. Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.

Recrimination, what.

NOTE.—This section rests upon the principle that he who is himself in the wrong cannot be heard to complain in a Court of justice of another's wrong pertaining to the same matter. Bush vs. Brainard, 1 Cow., p. 78; Bruckle vs. Dry Dock Co., 2 Hull, p. 151; Collins vs. Blantern, 2 Wils., p. 341; Gregg vs. Wyman, 4 Cush, p. 322; Hyatt vs. Wood, 4 Johns., p. 150; Roby vs. West, 4 N. H., p. 285; Freeman vs. Sedgwick, 6 Gill, p. 28; Gregory vs. Haworth, 25 Cal., p. 653.

123. Condonation of a cause of divorce shown in the answer as a recriminatory defense is a bar to such defense when the condonee has fully performed the marital duties, and is without reproach since the condonation, or if three years or more have elapsed after the condonation, and before the accruing or completion of the cause of divorce against which the recrimination is shown.

Condonation in a recriminatory defense a bar to such defense, when.

NOTE.—Bish. on Mar. and Div., Secs. 97-100. It was held in New York, in the absence of statutory provisions upon the subject, that condonation does not necessarily remove the recriminatory bar, and that

whether it would so operate or not depended upon the particular circumstances of each case. *Wood vs. Wood*, 2 Paige, p. 108; *Morrell vs. Morrell*, 1 Barb., p. 318. The contrary was held in New Hampshire (*Masten vs. Masten*, 15 N. H., p. 236), and such is now the statutory rule in New York. *Morrell vs. Morrell*, *supra*. In *Anichini vs. Anichini*, 2 Curt. Ec., p. 210, 7 Eng. Ec., p. 85, Dr. Lushington said: "Where a condonation has taken place with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband. Suppose he fulfills the condition, and never after violates the obligation of the marriage bed—is the condonation to have no other effect than to bar a suit against him? I think the effect is to make him *rectus et integer*, except that his past transgression may be revived by subsequent misconduct." In a subsequent case before the new Divorce Court of England, Cresswell, J., followed this doctrine of Dr. Lushington. *Seller vs. Seller*, 1 Swab. & T., p. 482.

Divorce
denied,
when.

124. A divorce must be denied:

1. When the cause is adultery and the action is not commenced within five years after the commission of the act of adultery, or after its discovery by the injured party; or,

2. When the cause is conviction of felony, and the action is not commenced before the expiration of one year after a pardon or the termination of the period of sentence;

3. In all other cases when there is an unreasonable lapse of time after the commission of the offense and before the commencement of the action.

Lapse of
time
establishes
certain pre-
sumptions.

125. Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense.

NOTE.—2 Bishop on Marriage and Divorce, Sec. 108.

126. The presumptions arising from lapse of time

may be rebutted by showing reasonable grounds for the delay in commencing the action.

Presump-
tions may
be rebutted

NOTE.—2 Bishop on Marriage and Divorce, Sec. 106.

127. There are no limitations of time for commencing actions for divorce, except such as are contained in Section 124.

Limitation
of time.

NOTE.—Before the adoption of this Code there was no specific limitation in divorce cases. The only statute upon the subject was the Act of 1850 (Stats. 1850, p. 343), as follows: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." The New York Civil Code provides four years limitation in cases of adultery. Upon a careful examination of the laws of the different States upon the subject, it appears very difficult to establish any exact rule of time, however desirable such a rule might be. There are so many instances of efforts at reformation—so much waiting and hoping before finally attempting to break, judicially, the marriage relation—that any arbitrary rule which would *force the party to commence an action* or lose the remedy, would defeat the discharge of the most Christian duties arising from the relation, or deprive the party of all relief when all efforts fail.—*Pellew vs. Pellew*, 1 Swab. and Trist., p. 553; also, *Matthews vs. Matthews*, 1 Swab. and Trist., p. 499.

128. A divorce must not be granted unless the plaintiff has been a resident of the State for six months next preceding the commencement of the action.

Divorces
granted,
when.

NOTE.—The Court has no jurisdiction to grant a divorce, unless the applicant aver and prove six months residence within the State next before making the application.—*Bennett vs. Bennett*, 28 Cal., p. 599.

129. In actions for divorce the presumption of law, that the domicile of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

Proof of
actual
residence
required.
Presump-
tions do not
apply.

NOTE.—In *Kashaw vs. Kashaw*, 3 Cal., p. 312, where the husband had been a resident of this State since 1850, and had his domicile in San Francisco, and

the wife followed him, and arrived here and commenced her suit before six months had elapsed after her arrival, it was held that the domicile of the husband was the domicile of the wife, and that in contemplation of law the wife must be considered as having been a resident of this State continuously from the time her husband arrived here. In *Kashaw vs. Kashaw* the decision was rested upon the general rule that the wife's domicile follows her husband's. The attention of the Court was not directed to the fact that the law recognizes a wife as having a separate existence, and separate interests, and separate rights in those cases where the express object is to show that the relation itself ought to be dissolved.—*Harteau vs. Harteau*, 14 Pick., p. 181; *The Republic vs. Skidmore*, 2 Texas, p. 261. "The doctrine that, for the purpose of divorce," says Mr. Bishop, "the wife may have a domicile separate from her husband, is well established in the American tribunals, although some of the authorities would seem to make the distinction (it is submitted without proper foundation) that a wife cannot lose her domicile by the husband's change of residence after the offense is committed, yet cannot, on the other hand, acquire a new one."—2 Bishop on Marriage and Divorce, Sec. 128; *Frery vs. Frery*, 10 N. H., p. 61; *Harding vs. Alden*, 9 Greenl., p. 140; *Sawtell vs. Sawtell*, 17 Conn., p. 284; *Fickle vs. Fickle*, 5 Serg., p. 203; *Richardson vs. Richardson*, 2 Mass., p. 153; *Fishli vs. Fishli*, 2 Litt., p. 337; *Tolen vs. Tolen*, 2 Blackf., p. 407; *Hare vs. Hare*, 10 Texas, p. 355; *Hinds vs. Hinds*, 1 Iowa, p. 36; *Hanberry vs. Hanberry*, 29 Ala., p. 719; *Yates vs. Yates*, 2 Beasley, p. 280. And in *Moffatt vs. Moffatt*, 5 Cal., p. 280, the Supreme Court of this State recognize the principles embodied in Section 129, by holding that the desertion of the husband entitles the wife to her own domicile.

Divorces
not to be
granted by
default,
etc.

130. No divorce must be granted upon the default of the defendant, or upon the statement, admission, or uncorroborated testimony of the parties, or upon any statement or finding of fact made by a referee, but the Court must require proof of the facts alleged, which proof, if taken before a referee, must be upon written questions and answers.

NOTE.—Confessions may be received in evidence, but a decree cannot be granted upon them alone.—*Baker vs. Baker*, 13 Cal., p. 87. If a referee in an action for

a divorce finds the facts, the Court must disregard the finding and determine the cause upon the evidence. *Baker vs. Baker*, 10 Cal., p. 527; *Benkert vs. Benkert*, 32 Cal., p. 467.

ARTICLE IV.

GENERAL PROVISIONS.

- SECTION 136.** Relief may be adjudged in some cases, where separation is denied.
137. Expense of action.
138. Orders respecting custody of children.
139. Support of wife and children on divorce or separation granted to wife.
140. Security for maintenance and alimony.
141. Court shall resort to what, in executing certain sections.
142. If wife has sufficient for her support, Court may withhold allowance.
143. Community and separate property may be subjected to support and educate children.
144. Legitimacy of issue.
145. Same.
146. Disposition of community property on divorce.
147. How disposed of when divorce rendered on adultery as a cause.
148. Such an action subject to revision on appeal.

136. Though judgment of divorce is denied, the Court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband.

Relief may be adjudged in some cases, where separation is denied.

NOTE.—P—— vs. P——, 24 How. Pr., p. 197.

137. While an action for divorce is pending the Court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action.

Expense of action.

NOTE.—*North vs. North*, 1 Barb. Ch., p. 241. The Court may direct the husband to pay a monthly sum as alimony, the allowance to be based on his earnings, or ability to earn money.—*Eidenmuller vs. Eidenmuller*, 37 Cal., p. 364.

Orders
respecting
custody of
children.

138. In an action for divorce the Court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

Support of
wife and
children
on divorce
or
separation
granted
to wife.

139. Where a divorce is granted for an offense of the husband, the Court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the Court may deem just, having regard to the circumstances of the parties respectively; and the Court may, from time to time, modify its orders in these respects.

NOTE.—It has been questioned whether alimony can be granted to extend beyond the life of the husband. In *Burr vs. Burr*, 10 Paige, p. 20, it was held that it may.

Security for
main-
tenance and
alimony.

140. The Court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this Chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

NOTE.—In a suit for a divorce the Court has the power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt in case of a refusal to pay.—*Ex parte Perkins*, 18 Cal., p. 60.

Court
shall resort
to what, in
executing
certain
sections.

141. In executing the five preceding sections the Court must resort:

1. To the community property; then,
2. To the separate property of the husband.

If wife has
sufficient
for her
support,
Court may
withhold
allowance.

142. When the wife has either a separate estate, or there is community property sufficient to give her alimony or a proper support, the Court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

143. The community property and the separate property may be subjected to the support and education of the children in such proportions as the Court deems just.

Community and separate property may be subjected to support and educate children.

144. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the wife before the commencement of the action is not affected.

Legitimacy of issue.

145. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the Court, upon the evidence in the case.

Same.

146. In case of the dissolution of the marriage by decree of any Court of competent jurisdiction, the community property must be equally divided between the parties; and the Court granting the decree must make such order for the division of the community property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require.

Disposition of community property on divorce.

NOTE.—A partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and one of the proper subjects of the action.—*Kashaw vs. Kashaw*, 3 Cal., p. 312; *Gimmy vs. Gimmy*, 22 Cal., p. 633. If the decree did not direct a division of the community property, it does not conclude either parties in respect to their claims to such property (*Godey vs. Godey*, 39 Cal., p. 157), and another Court than the one rendering the decree, if otherwise competent, may determine disposition of the property.—*Id.* If the decree directs an equal division of the property, the former husband and wife become, from the time the decree is rendered, tenants in common of the real property.—*McLeran vs. Benton*, 31 Cal., p. 29.

147. When the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party

How
disposed of
when
divorce
rendered
on adultery
as a cause.

in fault is only entitled to such portion of the community property as the Court granting the decree may, in its discretion, from the facts of the case, deem just.

NOTE.—If the divorce is granted because of adultery, the Court may award all the common property to the innocent party.—*Miller vs. Miller*, 33 Cal., p. 353. But a decree of divorce simply for the cause of adultery does not deprive the guilty party of his interest in the community property.—*Godey vs. Godey*, 39 Cal., p. 157.

Such an
action
subject to
revision
on appeal.

148. The order for the disposition of the community property, under the preceding section, is subject to revision on appeal in all respects, including the exercise of discretion by the Court below.

NOTE.—Where a divorce is granted on the ground of extreme cruelty, the appellate Court will not set aside the judgment of the Court below, in dividing the community property, except there appears an abuse of discretion.—*Eidenmuller vs. Eidenmuller*, 37 Cal., p. 364.

CHAPTER III.

HUSBAND AND WIFE.

SECTION 155. Mutual obligations of husband and wife.

156. Rights of husband, as head of family.

157. In other respects their interests separate.

158. Husband and wife may make contracts.

159. How far may impair their legal obligations.

160. Consideration for agreement of separation.

161. May be joint tenants, etc.

162. Separate property of the wife.

163. Separate property of the husband.

164. Community property.

165. Inventory of separate property of wife.

166. Filing inventory notice of wife's title.

167. Wife not competent to contract for payment of money.

168. Earnings of wife not liable for debts of husband.

169. Earnings of wife, when living separate, separate property.

170. Liability for debts of wife contracted before marriage.

171. Wife's property not liable for debts of the husband, but liable for her own debts.

SECTION 172. Power of the husband over community property.

173. Courtesy and dower not allowed.

174. Support of wife.

175. Husband not liable when abandoned by wife.

176. When wife must support husband.

177. Rights of husband and wife governed by what.

178. Marriage settlement contracts, how executed.

179. To be acknowledged and recorded.

180. Effect of recording.

181. Minors may make marriage settlements.

155. Husband and wife contract towards each other obligations of mutual respect, fidelity, and support.

Mutual obligations of husband and wife.

156. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

Rights of husband, as head of family.

157. Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.

In other respects their interests separate.

158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on Trusts.

Husband and wife may make contracts.

NOTE.—*Jaques vs. Methodist Church*, 17 Johns., p. 548; *Fry vs. Fry*, 7 Paige, p. 461. A wife may sue her husband upon a promissory note executed by him before coverture, and which is her separate property.—*Wilson vs. Wilson*, 36 Cal., p. 447. And the right of wife to sue her husband is not limited to any particular class of actions.—*Id.*

159. A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree to an immediate separation, and may make provision for the

How far may impair their legal obligations.

support of either of them and of their children during such separation.

NOTE.—Beach vs. Beach, 2 Hill, p. 260; 1 Shar. Bl., p. 441 and note.

Consideration for agreement of separation.

160. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

NOTE.—In New York it has been held that a special consideration is necessary to support such an agreement.—Cropsey vs. McKinney, 30 Barb., p. 47.

May be joint tenants, etc.

161. A husband and wife may hold property as joint tenants, tenants in common, or as community property.

Separate property of the wife.

162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

NOTE.—Cal. Const., Art. XI. Sec. 14; Snyder vs. Webb, 3 Cal., p. 83; Bessie vs. Earle, 4 Cal., p. 200; Tryon vs. Sutton, 14 Cal., p. 490; Racouillat vs. Sansevain, 32 Cal., p. 376; Hart vs. Robinson, 21 Cal., p. 346; 26 Cal., p. 546; 11 Cal., p. 71; 30 Cal., p. 511; 25 Cal., p. 367; 20 Cal., p. 175; 12 Cal., p. 564; 14 Cal., p. 576; 21 Cal., p. 47; 15 Cal., p. 483; 36 Cal., p. 447. The term "separate property" in the fourteenth section of Article XI of the Constitution is used in its common law sense, and by that law "separate property" means an estate held, both in its use and in its title, for the exclusive benefit of the wife.—George vs. Ransom, 15 Cal., p. 322; Spear vs. Ward, 20 Cal., p. 674; Lewis vs. Johns, 24 Cal., p. 101. The word "separate," as applied to a married woman's property in Section 14 of Article XI of the Constitution, neither enlarges nor limits her right to the property mentioned, but merely distinguishes it from her common property.—Dow vs. Gould & Curry S. M. Co., 31 Cal., 629. Property purchased during coverture with funds which constitute a part of the separate estate of the wife, will also be her separate estate.—Ramsdell vs. Fuller, 28 Cal., p. 37; Peck vs.

Brummagim, 31 Cal., p. 448. If the conveyance was to the husband, but the consideration was out of the separate estate of wife, the husband would be a trustee of the wife, holding the title for her use.—*Ingersoll vs. Truebody*, 40 Cal., p. 603. If the husband, at his own instance, expends money which is the common property in building a house on land the separate property of the wife, he has no lien on the house or lot therefor, nor have his creditors after his decease; the house becomes the separate property of the wife.—*Peck vs. Brummagim*, 31 Cal., p. 440. No interest in the use or enjoyment of the wife's separate property passes by the fact of marriage to the husband; nor can the husband by any independent act of his acquire an interest in such property, nor by his supervision or labor can he acquire any interest in the increase of the same, nor is there an implied obligation on the part of the wife to compensate the husband for his supervision and labor bestowed upon such property.—*Lewis vs. Johns*, 24 Cal., p. 98; same vs. same, 34 Cal., p. 635. Neither the husband nor his creditors can claim the proceeds or fruits of the separate estate of the wife. A law giving them such fruits is unconstitutional.—*George vs. Ransom*, 15 Cal., p. 322.

163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. Separate property of the husband.

NOTE.—The purchase of land by the husband after marriage with his separate funds acquired before marriage, and the taking of a conveyance therefor in the name of his minor children by a former wife, is not a fraud upon the rights of his wife.—*Smith vs. Smith*, 12 Cal., p. 216; *McDonald vs. Badger*, 23 Cal., p. 398. Under the Spanish and Mexican law, land donated by the Government to the husband became his separate estate, and passed, upon his dying intestate, to his heirs at law.—*Wilson vs. Castro*, 31 Cal., p. 420; *Coppinger vs. Rice*, 33 Cal., p. 424; *Hood vs. Hamilton*, 33 Cal., p. 703.

164. All other property acquired after marriage, by either husband or wife, or both, is community property. Community property.

NOTE.—8 Cal., p. 507; 11 Cal., p. 201; 12 Cal., p. 216; 12 Cal., p. 247; 12 Cal., p. 114; 15 Cal., p. 127; 21

Cal., p. 87; 22 Cal., p. 283; 23 Cal., p. 70; 23 Cal., p. 393; 26 Cal., p. 546; 31 Cal., p. 440. All property acquired after marriage, by either husband or wife, except such as is acquired by gift, bequest, devise, or descent, is common property.—Meyer vs. Kruger, 12 Cal., p. 247; Scott vs. Ward, 13 Cal., p. 470; Pixley vs. Huggins, 15 Cal., p. 131; Kohner vs. Aahenaur, 17 Cal., p. 581; Burton vs. Lies, 21 Cal., p. 91; Adams vs. Knowlton, 22 Cal., p. 288; Tustin vs. Faught, 23 Cal., p. 241; Landers vs. Bolton, 26 Cal., p. 420. The homestead does not constitute any portion of the common property.—Estate of Tompkins, 12 Cal., p. 114; Gimmy vs. Doane, 22 Cal., p. 638; Estate of James, 23 Cal., p. 418. The law of this State in relation to the rights of husband and wife as to the common property, is similar to the laws of Louisiana and Texas; and in those States it is held by their highest tribunals that all property acquired by either spouse during the existence of the community is *presumed* to belong to it, and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate.—Smith vs. Smith, 12 Cal., p. 216; Meyer vs. Kruger, 12 Cal., p. 247; Adams vs. Knowlton, 22 Cal., p. 283; Riley vs. Pehl, 23 Cal., p. 70; Fuller vs. Furgeson, 26 Cal., p. 546; Althof vs. Conheim, 38 Cal., p. 230. A deed to the wife of real estate, which is upon its face a deed of purchase, and recites a consideration paid, is presumptive evidence that the property thereby conveyed belongs to the community and is liable as such for the debts of the husband; but this presumption may be rebutted by showing that it was purchased with money belonging to the separate estate of the wife, or was taken as the separate estate of one of the spouses.—McDonald vs. Badger, 23 Cal., p. 393; Ramsdell vs. Fuller, 23 Cal., p. 37; Peck vs. Brummagin, 31 Cal., p. 440; Ingersoll vs. Truebody, 40 Cal., p. 603.

Inventory
of separate
property
of wife.

165. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the Recorder of the county in which the parties reside.

166. The filing of the inventory in the Recorder's office is notice and primary evidence of the title of the wife.

Filing
inventory
notice of
wife's title.

167. A wife cannot make a contract for the payment of money.

Wife not
competent
to contract
for
payment
of money.

NOTE.—At common law a married woman could not bind herself by contract.—*Luning vs. Brady*, 10 Cal., p. 265. Where a wife borrows money for purchase of real estate, and took the deed in her own name, the husband, by using and occupying same, selling a portion, etc., he ratifies the act of the wife and is responsible for the repayment of the borrowed money.—*Althof vs. Conheim*, 38 Cal., p. 230. In this State, except in special cases, a married woman cannot, by contract, create a personal liability against herself in any form.—*Macclay vs. Love*, 25 Cal., p. 367; *Shaver vs. Bear River and Auburn W. and M. Co.*, 10 Cal., p. 396. But if she entered into a contract prior to marriage, specific performance may be enforced, notwithstanding subsequent marriage.—*Love vs. Watkins*, 40 Cal., p. 547. The promissory note of a married woman is void.—*Simpers vs. Sloan*, 5 Cal., p. 457; *Smith vs. Greer*, 31 Cal., p. 476. A promissory note executed by the husband and wife is the note of the husband alone.—*Brown vs. Orr*, 29 Cal., p. 120; *Pfeiffer vs. Riehn*, 13 Cal., p. 643; *Shartzer vs. Love*, 40 Cal., p. 93.

168. The earnings of the wife are not liable for the debts of the husband.

Earnings of
wife not
liable for
debts of
husband.

NOTE.—Stats. 1870, p. 226.

169. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

Earnings of
wife, when
living
separate,
separate
property.

NOTE.—Stats. 1870, p. 226.

170. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

Liability
for debts of
wife
contracted
before
marriage.

NOTE.—At common law the husband, during coverture, was liable for the debts of his wife contracted

before the marriage. Sections 170 and 171 modify the common law in two respects. They render the separate property of the wife liable and exempt the separate property of the husband. Beyond this exemption of his separate property, the liability of the husband exists—that is, he is liable to the extent of the common property.—*Van Masen vs. Johnson*, 15 Cal., p. 308; *Packard vs. Arellanes*, 17 Cal., p. 537; *Kays vs. Phelan*, 19 Cal., p. 128. In a suit against the husband for services rendered by the plaintiff to the wife before her marriage, judgment may be entered against both defendants, with a direction that it be enforced against the separate property of the wife and the common property of both.—*Van Masen vs. Johnson*, 15 Cal., p. 308; *Kays vs. Phelan*, 19 Cal., p. 128; *Corcoran vs. Doll*, 32 Cal., p. 90.

Wife's
property
not liable
for debts
of the
husband,
but liable
for her
own debts.

171. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage.

NOTE.—See note to Sec. 170.

Power
of the
husband
over
community
property.

172. The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate.

NOTE.—The title of the common property is in the husband, and he can dispose of the same (except by devise—*Beard vs. Knox*, 5 Cal., p. 252), as absolutely as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.—*Van Muren vs. Johnson*, 15 Cal., p. 308. The law, in vesting in the husband the absolute power of disposition of the common property as of his separate estate, designed to facilitate its bona fide alienation, and to prevent clogs upon its transfer by claims of the wife. The law will not support a voluntary disposition of the common property with a view of defeating any claims of the wife.—*Smith vs. Smith*, 12 Cal., p. 216. The husband has no power to dispose of the common property by devise defeating the rights of the wife.—*Beard vs. Knox*, 5 Cal., p. 252; *Scott vs. Ward*, 13 Cal., p. 469; *Payne vs. Payne*, 18 Cal., p. 301; *Morrison vs. Bowman*, 29 Cal., p. 349.

173. No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

Courtesy
and dower
not
allowed.

NOTE.—Beard vs. Knox, 5 Cal., p. 252.

174. If the husband neglects to make adequate provision for the support of his wife, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

Support
of wife.

NOTE.—Cromwell vs. Benjamin, 41 Barb., 558. This obligation is not founded merely upon a supposed agency of the wife.—Read vs. Legard, 6 Exch., p. 636; see Sykes vs. Halstead, 1 Sandf., p. 483. If the husband and wife separate by consent, and the husband, by agreement, secures to her a separate maintenance, suitable to their circumstances, he is not liable for anything furnished to her, so long as he performs such agreement.—Calkins vs. Long, 22 Barb., p. 97, and cases there cited.

175. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him.

Husband
not liable
when
abandoned
by wife.

NOTE.—Blowers vs. Sturtevant, 4 Denio, p. 46; McGahay vs. Williams, 12 Johns., p. 293.

176. The wife must support the husband out of her separate property when he has no separate property and they no community property, and he from infirmity is not able or competent to support himself.

When wife
must
support
husband.

177. The property rights of husband and wife are governed by this Chapter, unless there is a marriage settlement containing stipulations contrary thereto.

Rights of
husband
governed
by what.

178. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

Marriage
settlement
contracts,
how
executed.

To be
acknowledged and
recorded.

179. When such contract is acknowledged or proved, it must be recorded in the office of the Recorder of every county in which any real estate may be situated which is granted or affected by such contract.

Effect of
recording.

180. The recording or non-recording of such contract has a like effect as the recording or non-recording of a grant of real property.

Minors
may make
marriage
settlements

181. A minor capable of contracting marriage may make a valid marriage settlement.

NOTE.—As to married women becoming sole traders, and their rights and liabilities as such, see Code of Civil Procedure, Secs. 1811 to 1821, inclusive.

TITLE II.

PARENT AND CHILD.

CHAPTER I. *By Birth.*

II. *By Adoption.*

CHAPTER I.

CHILDREN BY BIRTH.

SECTION 193. Legitimacy of children born in wedlock.

194. Legitimacy of children born out of wedlock.

195. Who may dispute the legitimacy of a child.

196. Obligation of parents for the support and education of their children.

197. Custody of legitimate child.

198. Husband and wife living separate, neither to have superior right to custody of children.

199. When husband or wife may bring action for the exclusive control of children. Decree in such cases.

200. Custody of an illegitimate child.

201. Allowance to parent.

- SECTION 202.** Parent cannot control the property of child.
203. Remedy for parental abuse.
204. When parental authority ceases.
205. Remedy when a parent dies without providing for the support of his child.
206. Reciprocal duties of parents and children in maintaining each other.
207. When a parent is liable for necessities supplied to a child.
208. When a parent is not liable for support furnished his child.
209. Husband not bound for the support of his wife's children by a former marriage.
210. Compensation and support of adult child.
211. Parent may relinquish services and custody of child.
212. Wages of minors.
213. Right of parent to determine the residence of child.
214. Wife in certain cases may obtain custody of minor children.

193. All children born in wedlock are presumed to be legitimate.

Legitimacy
of children
born in
wedlock.

NOTE.—*Caujolle vs. Ferrie*, 23 N. Y., p. 139; *Kliernert vs. Ehlers*, 2 Wright, Pa., p. 439; *Van Aernam vs. Van Aernam*, 1 Barb. Ch., p. 375; *Stegall vs. Stegall*, 2 Brock., p. 256; *Page vs. Dennison*, 1 Grant, p. 377; 5 Casey, p. 420; *Phillips vs. Allen*, 2 Allen, p. 453. Said Lord Langdale, in *Hargrave vs. Hargrave*, 9 Beav., p. 552: "A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was: 1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother; 3. Entirely absent at the period during which the child must, in the course of nature, have been begotten; or, 4. Only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." And in *Bury vs. Phillpot*, 2 Mylne & K., p. 349, Sir John Leach, Master of the Rolls, said: "If it were proved that she (the wife) slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate." To the same effect are the cases of *Morris vs. Davies*, 3 Car. & P., pp. 215, 427; *Rex vs. Luffe*, 8 East., p. 193.

Legitimacy
of children
born out of
wedlock.

194. All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate. But if during such period she marries again, and afterwards has a child, it is presumed to be her legitimate offspring by the second husband.

NOTE.—At common law a child born more than forty weeks after the death of the husband is an illegitimate child.—Reeves' Dom. Rel., p. 402; Hargraves' Notes Co. Lit., p. 129. The civil law and the *Code Civil* fixed the three hundredth day as the *ultimum tempus gestationis*.—Dig., 38, 16, p. 11; Code Civil, Art. 312.

Who may
dispute the
legitimacy
of a child.

195. The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.

Obligation
of parents
for the
support and
education
of their
children.

196. The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

NOTE.—Reeves' Dom. Rel., p. 412; 1 Bl. Com., p. 446.

Custody of
a legiti-
mate child.

197. The father of a legitimate unmarried minor is entitled to its custody, services, and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, if she is living and capable of consent. If the father is dead, or is unable, or refuses to take the custody, or has abandoned his family, the mother is entitled thereto.

Husband
and wife
living
separate,
neither to
have supe-
rior right to
custody of
children.

198. The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of

the children of the marriage, while such husband and wife live separate and apart from each other.

199. Without application for a divorce, the husband or the wife may bring an action for the exclusive control of the children of the marriage; and the Court may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education, and control of the children of the marriage, as may be just, and in accordance with the natural rights of the parents and the best interests of the children, and may at any time thereafter amend, vary, or modify such order or decree, as the natural rights and the interests of the parties, including the children, may require.

When husband or wife may bring action for the exclusive control of children. Decree in such cases.

200. The mother of an illegitimate unmarried minor is entitled to its custody, services, and earnings.

Custody of an illegitimate child.

201. The proper Court may direct an allowance to be made to the parent of a child, out of its property, for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

Allowance to parent.

NOTE.—Matter of Bostwick, 4 Johns. Ch., p. 100; Matter of Kane, 2 Barb. Ch., p. 375; Maberly vs. Turton, 14 Ves., p. 499; Simon vs. Barber, 1 Taml., p. 22; Wilkes vs. Rogers, 6 Johns., pp. 577, 578; Matter of Burke, 4 Sandf. Ch., p. 617.

202. The parent, as such, has no control over the property of the child.

Parent cannot control the property of child.

NOTE.—Combs vs. Jackson, 2 Wend., p. 153; Fonda vs. Van Horne, 15 Wend., p. 631; Hyde vs. Stone, 7 Wend., p. 354.

203. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the Supervisors of the county where the

Remedy for parental abuse.

child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced.

When
parental
authority
ceases.

204. The authority of a parent ceases:

1. Upon the appointment, by a Court, of a guardian of the person of a child;
2. Upon the marriage of the child; or,
3. Upon its attaining majority.

Remedy
when a
parent dies
without
providing
for the sup-
port of his
child.

205. If a parent chargeable with the support of a child dies, leaving it chargeable to the county, and leaving an estate sufficient for its support, the Supervisors of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees, and next of kin of the parent.

Reciprocal
duties of
parents and
children in
maintain-
ing each
other.

206. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding.

NOTE.—Cromwell vs. Benjamin, 41 Barb., p. 558; Shelton vs. Springett, 11 C. B., p. 452; Mortemore vs. Wright, 6 M. and W., p. 488.

When a
parent is
liable for
necessaries
supplied to
a child.

207. If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent.

NOTE.—Van Valkenburgh vs. Watson, 13 Johns., p. 480; Chilcott vs. Trimble, 13 Barb., p. 502; Clinton vs. Rowland, 24 id., p. 634; Henry vs. Betts, 1 Hilt., p. 156; and see Raymond vs. Loyl, 10 Barb., p. 483. The age of the child is immaterial.—Cromwell vs. Benjamin, 41 Barb., p. 558.

208. A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause.

When a parent is not liable for support furnished his child.

NOTE.—Burritt vs. Burritt, 29 Barb., p. 124; Finch vs. Finch, 22 Conn., p. 411. Compare Stanton vs. Willson, 3 Day, p. 37. Chilcott vs. Trimble, 13 Barb., p. 502; Raymond vs. Loyl, 10 id., p. 483; Clark vs. Fitch, 2 Wend., p. 459; Johnson vs. Gibson, 4 E. D. Smith, p. 231.

209. A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services.

Husband not bound for the support of his wife's children by a former marriage.

NOTE.—Gay vs. Ballou, 4 Wend., p. 403; Williams vs. Hutchinson, 5 Barb., p. 122; Bartley vs. Richtmeyer, 4 N. Y. (4 Comst.), p. 38; Elliott vs. Lewis, 3 Edw., p. 40; Sharp vs. Cropsey, 11 Barb., p. 224; Williams vs. Hutchinson, 3 N. Y. (3 Comst.), p. 312.

210. Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

Compensation and support of adult child.

NOTE.—Dye vs. Kerr, 15 Barb., p. 444; Andrus vs. Foster, 17 Verm., p. 556; Resor vs. Johnson, 1 Carter (Ind.), p. 100; Rex vs. Sow, 1 B. and Ald., p. 179; and see Cropsey vs. Sweeney, 27 Barb., p. 310; S. C., 7 Abbott's Pr., p. 129; Moore vs. Moore, 21 How. Pr., p. 211.

211. The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment.

Parent may relinquish services and custody of child.

NOTE.—McCloskey vs. Cyphert, 27 Penn. St., p. 220; McCoy vs. Huffman, 8 Cow., p. 84; Burlingame vs.

Burlingame, 7 id., p. 92; Whiting vs. Earle, 3 Pick., p. 201; Morse vs. Welton, 6 Conn., p. 547; Varney vs. Young, 11 Verm., p. 258; Canovar vs. Cooper, 3 Barb., p. 115; Stiles vs. Granville, 6 Cush., p. 458; Clinton vs. York, 26 Me., p. 167; Wodell vs. Coggeshall, 2 Metc. (Mass.), p. 91; Cloud vs. Hamilton, 11 Humph., p. 104.

Wages of
minors.

212. The wages of a minor employed in service may be paid to him, unless, within thirty days after the commencement of the service, the parent or guardian entitled thereto gives the employer notice that he claims such wages.

Right of
parent to
determine
the resi-
dence of
child.

213. A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper Court to restrain a removal which would prejudice the rights or welfare of the child.

NOTE.—Wood vs. Wood, 5 Paige, p. 596.

Wife in
certain
cases may
obtain
custody of
minor
children.

214. When a husband and wife live in a state of separation, without being divorced, any Court of competent jurisdiction, upon application of either, if an inhabitant of this State, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the Court must be guided by the rules prescribed in Section 246.

CHAPTER II.

ADOPTION.

SECTION 221. Child may be adopted.

222. Who may adopt.

223. Consent of wife necessary.

224. Consent of child's parents.

225. Consent of child.

226. Proceedings on adoption.

SECTION 227. Judge's order.

228. Effect of adoption.

229. Effect on former relations of child.

230. Adoption of illegitimate child.

221. Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this Chapter. Child may be adopted.

222. The person adopting a child must be at least fifteen years older than the person adopted, and must have been married, and if a woman, must be a widow, or be lawfully divorced from her husband without her fault. Who may adopt.

223. A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife. Consent of wife necessary.

224. A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be a habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty or neglect. Consent of child's parents.

225. The consent of a child, if over the age of twelve years, is necessary to its adoption. Consent of child.

226. The person adopting a child, and the child adopted, and the other persons whose consent is necessary, must appear before the County Judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated. Proceedings on adoption.

Judge's
order.

227. The Judge must examine all persons appearing before him pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

Effect of
adoption.

228. A child, when adopted, takes the name of the person adopting, and the two thenceforth sustain towards each other the legal relation of parent and child, and have all the right and are subject to all the duties of that relation.

Effect on
former
relations
of child.

229. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.

Adoption of
illegiti-
mate child.

230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife; if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption.

TITLE III.

GUARDIAN AND WARD.

SECTION 236. Guardian, what.

237. Ward, what.

238. Kinds of guardians.

239. General guardian, what.

240. Special guardian, what.

241. Appointment by parent.

242. No person guardian of estate without appointment.

SECTION 243. Appointment by Court.

241. Same.

245. Jurisdiction.

246. Rules for awarding custody of minor.

247. Powers of guardian appointed by Court.

248. Duties of guardian of the person.

249. Duties of guardian of estate.

250. Relation confidential.

251. Guardian under direction of Court.

252. Death of a joint guardian.

253. Removal of guardian.

254. Guardian appointed by parent, how superseded.

255. Guardian appointed by Court, how superseded.

256. Release by ward.

257. Guardian's discharge.

258. Insane persons.

236. A guardian is a person appointed to take Guardian.
what
care of the person or property of another.

NOTE.—Bouvier, Title "Guardian," defines guardian to be one who legally has the care and management of the person, or the estate, or both, of a child during its minority.—Reeves' Dom. Rel., p. 311. Such a person is known in the civil law by the name of curator.—1 Sec. Éi du Droit Civ. Rom., p. 241. There were four kinds of guardians at common law, called respectively guardians by nature, guardians for nurture, guardians in socage, and guardians in chivalry. The guardians by nature were the father, and in some cases the mother of the children; guardians for nurture were also the father or mother, and continued until the child attained the age of fourteen years; guardianship in socage took place only when the infant was entitled to an estate in lands by descent, and the next of kin, to whom the estate could not possibly descend, became the guardian in socage. Guardianship in socage, like that for nurture, continued only until the infant was fourteen years of age, at which age he was presumed to have attained sufficient discretion and judgment to choose a guardian for himself, and therefore was allowed to do so, subject, however, to the approval of the Court of Chancery. Guardianship in socage included the custody and care of both the person and estate of the infant. Guardianship in chivalry was a feature of the feudal system, and took place when lands came to an infant by descent which were held by Knight service. It continued until the infant attained the age of twenty-one years, if a male, and sixteen, if a female, and related to both per-

son and estate, without any obligations to account for the profits of the latter.—1 Bl. Com., Chap. 17; 2 Bl. Com., Chap. 5. These guardians were appointed or designated by the common law itself, except that the Chancellor, by virtue of his authority as representative of the King, who was the *parens patriæ*, and, as such, the guardian of all the infants in the kingdom, was allowed to appoint guardians to such infants as were without guardians at common law.—Lord vs. Hough, 37 Cal., p. 660.

Ward
what.

237. The person over whom or over whose property a guardian is appointed, is called his ward.

Kinds of
guardians.

238. Guardians are either:

1. General; or,
2. Special.

General
guardian,
what.

239. A general guardian is a guardian of the person or of all the property of the ward within this State, or of both.

Special
guardian,
what.

240. Every other is a special guardian.

Appoint-
ment by
parent.

241. A guardian of the person of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

1. If the child is legitimate, by the father, with the written consent of the mother; or by either parent, if the other is dead or incapable of consent.
2. If the child is illegitimate, by the mother.

NOTE.—Stats. 1850, p. 268, Sec. 10, reads as follows:

“The father of any child who is a minor, may, by his last will and testament, appoint a guardian or guardians of such child, whether born before or after the time of making such will; and in the case of the death of the father, the mother of such child may in like manner appoint a guardian or guardians, if such child shall not then have any legally appointed guardian. And every testamentary guardian shall give bonds and qualify, and shall have the same powers and perform the same duties with regard to the person and the estate of such minor as guardians appointed by the Probate Court, except so far as the said powers and duties may have been legally modified, enlarged, or changed by the will by which such guardian was appointed.”

Secs. 5 and 6 of the same Act read as follows:

“Sec. 5. The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to

transact their own business, and not otherwise unsuitable, shall be entitled to the guardianship of the minor."

"Sec. 6. If the minor have no father or mother living, and competent to have the custody and care of the education of such minor, the guardian so appointed shall have the custody and tuition of his ward."

This statute received a construction in *Lord vs. Hough*, 37 Cal., p. 658. In that case, L. being the father of three children, aged respectively eight, six, and four years, made his will, by which he devised the custody of his children to his mother, in these words: "The personal care, custody, and control of my said children I do hereby confide to my dear mother *solely*, except in such cases as my said trustees and executors may deem contrariwise for the purpose of education;" and died leaving a widow, who was in all respects a fit and proper person to be intrusted with the personal care and custody of her children. The action was by the widow against the testamentary guardian and executors of L. for the custody of the children, and it was held that under the statute in question the widow's claim to the personal custody of the children was superior to that of the testamentary guardian.

242. No person, whether a parent or otherwise, has any power as guardian of property, except by appointment as hereinafter provided.

No person guardian of estate without appointment.

NOTE.—When a parent dies in possession of real property, leaving an infant heir thereof, and his guardian by nature enters thereon, the entry is presumed to be as guardian, unless accompanied by acts or declarations inconsistent with such character.—*Byrne vs. Van Hoesen*, 5 Johns., p. 66; *Jackson vs. DeWalt*, 7 id., p. 157; *Putnam vs. Ritchie*, 6 Paige, p. 390; *Becher vs. Crouse*, 19 Wend., p. 306.

243. A guardian of the person or property, or both, of a person residing in this State, who is a minor, or of unsound mind, may be appointed in all cases by the Probate Court, as provided in the CODE OF CIVIL PROCEDURE.

Appointment by Court.

NOTE.—As to appointment of guardians, their powers, duties, etc., see Code of Civil Procedure, Secs. 1747 to 1809, inclusive.

244. A guardian of the property within this State

. Same. of a person not residing therein, who is a minor, or of unsound mind, may be appointed by the Probate Court.

Jurisdiction. 245. In all cases the Court making the appointment of a guardian has exclusive jurisdiction to control him.

NOTE.—The Probate Court formerly could not compel a guardian to advance out of the estate of the ward the sums necessary for the ward's support.—Swift vs. Swift, 40 Cal., p. 456. But it is otherwise now.—See Code of Civil Procedure, Sec. 1771, and note.

Rules for awarding custody of minor.

246. In awarding the custody of a minor, or in appointing a general guardian, the Court or officer is to be guided by the following considerations:

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the Court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father.

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

First—To a parent.

Second—To a relative.

Third—To one who was indicated by the wishes of a deceased parent.

Fourth—To one who already stands in the position of a trustee of a fund to be applied to the child's support.

Fifth—To one of good moral character.

NOTE.—Foster vs. Mott, 3 Bradf., p. 409; Stuart vs. Bute, 9 H. of L. Cas., p. 440; Morehouse vs. Cooke, Hopk., p. 226; Underhill vs. Dennis, 9 Paige, p. 202 Re Pierce, 12 How. Pr., p. 532. But such wishes are

not conclusively binding.—*Foster vs. Mott, supra; Cozine vs. Horn*, 1 Bradf., p. 143; *Bennett vs. Byrne*, 2 Barb. Ch., 216.

247. A guardian appointed by a Court has power over the person and property of the ward, unless otherwise ordered. Powers of guardian appointed by Court.

248. A guardian of the person is charged with the custody of the ward, and must look to his support, health, and education. He may fix the residence of the ward at any place within the State, but not elsewhere, without permission of the Court. Duties of guardian of the person.

NOTE.—*Ex parte Bartlett*, 4 Bradf., p. 221; *Clarke vs. Montgomery*, 23 Barb., p. 464.

249. A guardian of the property must keep safely the property of his ward. He must not suffer any sale, waste, or destruction of the real property, but must maintain the inheritance, its buildings and appurtenances, out of the moneys of the estate, and deliver the same to the ward, at the close of his guardianship, in as good condition as he received them, inevitable decay and injury only excepted. Duties of guardian of estate.

NOTE.—The guardian has no further concern with or control over the real estate than what relates to the leasing of it and the reception of the rents and profits, and it is his duty to place the ward's land upon lease.—2 Kent's Com., p. 228; *Genet vs. Tallmadge*, 1 Johns. Ch., p. 561; *Jones vs. Ward*, 10 Yerger, p. 160. He may lease during the minority of the ward, but no longer.—*Roe vs. Hodgson*, 2 Wils., p. 129; *Field vs. Schieffelin*, 7 Johns. Ch., p. 154. But the guardian's lease of the infant's lands for a term of years extending beyond the infant's age of fourteen years is voidable, provided the infant be then entitled to choose his own guardian; and it may be avoided by the subsequent guardian chosen by the infant.—*Snook vs. Sutton*, 5 Halsted, p. 133. He may bring trespass or ejectment in his own name.—*Shopland vs. Ryoler*, Cro. I., p. 98; *Byrne vs. Van Hoesen*, 5 Johns., p. 66; *King vs. Inhabitants of Oakley*, 10 East., p. 491.

Relation
confi-
dential.

250. The relation of guardian and ward is confidential, and is subject to the provisions of the Title on Trust.

NOTE.—The guardian's trust is one of obligation and duty, and not one of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust.—2 Kent's Com., p. 229; *Dietterich vs. Heft*, 5 Barr's R., p. 87; *Clowes vs. Van Antwerp*, 4 Barb., p. 416; *Lefevre vs. Laraway*, 22 Barb., p. 168; *Kennard vs. Adams*, 11 B. Mon., p. 102; *Sparhawk vs. Allen*, 1 Foster, N. H., p. 9. A guardian's purchase of his ward's lands cannot be avoided by the latter as against the guardian's mortgagee, who paid a valuable consideration and had no notice of the circumstances of the sale.—*Wyman vs. Hooper*, 2 Gray, p. 141. The guardian of an infant has no power to enter into marriage articles with her intended husband which shall be obligatory upon her.—*Healy vs. Rowan*, 5 Gratt., p. 414. By the practice in Chancery, an infant is allowed, one year after he arrives of age, to investigate the guardian's accounts, and to surcharge and falsify if they be found wrong; and the guardian is not entitled to an absolute discharge until the expiration of that time.—In the matter of *Van Horne*, 7 Paige, p. 46. The Courts of equity throw a vigilant and jealous care over the dealings of guardians with infants, on their coming of age. If there be a pecuniary transaction between guardian and child just after the latter becomes of age, and without any benefit moving to the child, as in cases of gifts, the presumption is that undue influence has been employed, and that presumption must be rebutted by adequate proof.—*Archer vs. Hudson*, 7 Beavan, p. 551. The Courts set aside such transactions on the ground of public utility and policy, though there be no actual unfairness in the case.—*Hylton vs. Hylton*, 2 Vesey, p. 547; *Gale vs. Wells*, 12 Barb., p. 84.

Guardian
under
direction
of Court.

251. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the Court.

Death of a
joint
guardian.

252. On the death of one of two or more joint guardians, the power continues to the survivor until a further appointment is made by the Court.

253. A guardian may be removed by the Probate Court for any of the following causes: Removal of guardian.

1. For abuse of his trust;
2. For continued failure to perform its duties;
3. For incapacity to perform its duties;
4. For gross immorality;
5. For having an interest adverse to the faithful performance of his duties;
6. For removal from the State;
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship.

254. The power of a guardian appointed by a parent is superseded: Guardian appointed by parent, how superseded.

1. By his removal, as provided by Section 253;
2. By the solemnized marriage of the ward; or,
3. By the ward's attaining majority.

NOTE.—Brick's Estate, 15 Abb. Pr., p. 12; People vs. Kearney, 31 Barb., p. 430; Corrigan vs. Kiernan, 1 Bradf., p. 208.

255. The power of a guardian appointed by a Court is superseded only: Guardian appointed by Court, how superseded.

1. By the order of the Court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority.

NOTE.—It has been held that a guardian of the children of a convict, appointed during his civil death, is superseded by his pardon (Matter of Deming, 10 Johns., pp. 232, 483), and that a guardian improvidently appointed by the Court is superseded by the production of an appointment by the father (People vs. Kearney, 31 Barb., p. 430), but it seems proper that the guardian should be superseded only by order of the Court.

256. After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence. Release by ward.

NOTE.—Kirby vs. Taylor, 6 Johns. Ch., p. 242; Kirby vs. Turner, Hopk., p. 309; Fish vs. Miller, Hoffm., p. 267. See note to Section 250.

Guardian's
discharge.

257. A guardian appointed by a Court is not entitled to his discharge until one year after the ward's majority.

NOTE.—Matter of Van Horne, 7 Paige. p. 46. See note to Section 250.

Insane
persons.

258. A person of unsound mind may be placed in an asylum for such persons, upon the order of the County Judge of the county in which he resides, as follows:

1. The Judge must be satisfied, by the oath of two reputable physicians, that such person is of unsound mind, and unfit to be at large;

2. Before granting the order the Judge must examine the person himself, or if that is impracticable, cause him to be examined by an impartial person;

3. After the order is granted, the person alleged to be of unsound mind, his or her husband or wife, or relative to the third degree, may demand an investigation before a jury, which must be conducted in all respects as under an inquisition of lunacy.

TITLE IV:

MASTER AND SERVANT.

SECTION 264. Minors may apprentice themselves.

265. Consent of parents, etc., requisite.

266. Written consent.

267. Executors may bind.

268. Supervisors may bind out.

269. Town officers.

270. Age of apprentice to be inserted in indentures.

271. Indentures, conditions in.

272. Same.

273. Deposit of indentures.

274. Alien minors.

SECTION 275. Contract under preceding section to be acknowledged.

276. Causes for annulling indentures.

264. Every minor, with the consent of the persons or officers hereinafter mentioned, may, of his own free will, bind himself, in writing, to serve as clerk, apprentice, or servant, in any profession, trade, or employment, during his minority; and such binding shall be as valid and effectual as if such minor was of full age at the time of making the engagement.

Minors
may
apprentice
themselves

NOTE.—2 Kent's Com., p. 262. It has been declared that an apprenticeship cannot be created except by writing.—Peters vs. Lord, 18 Conn., p. 337. The indentures will not be rendered invalid by a failure to specify the trade, employment, or profession in which the infant is to be instructed.—Fowler vs. Hollenbeck, 9 Barb., p. 309.

265. Such consent shall be given:

1. By the father of the minor. If he be dead, or be not of legal capacity to give his consent, or if he shall have abandoned or neglected to provide for his family, and such fact be certified by a Justice of the Peace of the township or county, or sworn to by a credible witness, and such certificate or affidavit be indorsed on the indenture, then:

Consent of
parents,
etc.,
requisite.

2. By the mother. If the mother be dead, or be not of legal capacity to give such consent or refusal, then:

3. By the guardian of such infant. If such infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then:

4. By the Supervisors of the county, or any two Justices of the Peace, or the Judge of the Probate Court of the county;

5. If such minor be an orphan, under the care and control of any orphan asylum in this State, then by the Board of Managers thereof.

266. Such consent shall be signified in writing by

Written
consent.

the person entitled to give the same, by certificate at the end of, or indorsed upon the indentures.

Executors
may bind.

267. The executors of any last will of a parent, who shall be directed in such will to bring up his or her child to some trade or calling, may bind such child to service as a clerk, or apprentice, in like manner as the father might have done if living. If there is a surviving mother, her consent also is necessary.

Super-
visors may
bind out.

268. The Supervisors of the county may bind out minors who are or shall become chargeable to such county, to be clerks, apprentices, or servants, which binding shall be as effectual as if such minors had bound themselves with the consent of their father.

Town
officers.

269. In every town or city the presiding officer of the First Council or Legislative Board thereof, if there be more than one, or any public officer or officers appointed to provide for the poor, may in like manner bind out any child who, or whose parents are, chargeable to any such town or city.

Age of
apprentice
to be
inserted in
indentures.

270. The age of every infant so bound shall be inserted in the indentures, and shall be taken to be the true age; and whenever public officers are authorized to execute any indentures, or their consent is required to the validity of the same, it shall be their duty to inform themselves fully of the infant's age.

NOTE.—In New York it has been held that the statement of the age in the indentures may be contradicted by proof.—*Drew vs. Peckwell*, 1 E. D. Smith, p. 408; *Banks vs. Metcalf*, 1 Wheel. Cr. Cases, p. 381; *Matter of Brennan*, 1 Sandf., p. 711.

Inden-
tures,
conditions
in.

271. Every sum of money paid or agreed for, with or in relation to the binding out of any clerk, apprentice, or servant, shall be inserted in the indentures.

272. The indenture shall also contain an agreement, on the part of the person to whom such child

shall be bound, that he will cause such child to be instructed to read and write, and to be taught the general rules of arithmetic, or, in lieu thereof, that he will send such child to school three months of each year of the period of indenture. Same.

273. The counterpart of any indenture executed by any county, or city, or town officers, must be by them deposited in the office of the Clerk of the County Court. Deposit of indentures.

274. Any minor, capable of becoming a citizen of this State, coming from any other country, State, or Territory, may bind himself to service until his majority, or for any shorter term. Such contract, if made for the purpose of raising money to pay his passage, or for the payment of such passage, may be for the term of one year, although such term may extend beyond the time when such person will be of full age, but it shall in no case be for a longer term. Alien minors.

275. No contract made under the preceding section shall bind the servant, unless duly acknowledged by the minor, before some public magistrate or other officer authorized to administer oaths, nor unless a certificate, showing that the same was made freely, on private examination, be indorsed upon the contract. Contract under preceding section to be acknowledged.

276. Such indentures of apprenticeship may be annulled for: Causes for annulling indentures.

1. Fraud in the contract of indenture;
2. When such contract is not made or executed in accordance with the provisions of this Title;
3. For willful non-fulfillment, by such master, of the provisions of such indenture;
4. Cruelty or maltreatment of such apprentice by the master. In such case, the apprentice may recover for his services.

NOTE.—See Stats. 1858, p. 134.

PART IV.

CORPORATIONS.

TITLE I. GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.

- II. INSURANCE CORPORATIONS.
- III. RAILROAD CORPORATIONS.
- IV. STREET RAILROAD CORPORATIONS.
- V. WAGON ROAD CORPORATIONS.
- VI. BRIDGE, FERRY, WHARF, CHUTE, AND PIER
CORPORATIONS.
- VII. TELEGRAPH CORPORATIONS.
- VIII. WATER AND CANAL CORPORATIONS.
- IX. HOMESTEAD CORPORATIONS.
- X. SAVINGS AND LOAN CORPORATIONS.
- XI. MINING CORPORATIONS.
- XII. RELIGIOUS, SOCIAL, AND BENEVOLENT COR-
PORATIONS.
- XIII. CEMETERY CORPORATIONS.
- XIV. AGRICULTURAL FAIR CORPORATIONS.
- XV. GAS CORPORATIONS.
- XVI. LAND AND BUILDING CORPORATIONS.

TITLE I.

GENERAL PROVISIONS APPLICABLE TO ALL CORPORA- TIONS.

- CHAPTER I. *Formation of Corporations.*
- II. *Corporate Stock.*

CHAPTER III. *Corporate Powers.*IV. *Extension and Dissolution of Corporations.*

CHAPTER I.

FORMATION OF CORPORATIONS.

ARTICLE I. CORPORATIONS DEFINED AND HOW ORGANIZED.

II. BY-LAWS, DIRECTORS, ELECTIONS, AND MEETINGS.

ARTICLE I.

CORPORATIONS DEFINED AND HOW ORGANIZED.

SECTION 283. Corporation defined.

- 284. What are public and private corporations.
- 285. Corporations, how formed.
- 286. For what purpose private corporations are formed.
- 287. How corporations may continue their existence under this Code.
- 288. Existing corporations not affected.
- 289. Name of instrument creating corporation.
- 290. Articles of incorporation, what to contain.
- 291. Certain corporations to state further facts in articles.
- 292. Five corporators, three to be citizens of the State, to sign articles and acknowledge the same.
- 293. Prerequisite to filing articles. Amounts to be subscribed to be fixed.
- 294. Prerequisite to filing articles of corporations for profit.
- 295. Oath of officer to subscription of stock and payment of ten per cent.
- 296. To file articles with County Clerk and Secretary of State, and receive certificate. Term of existence.
- 297. Certified copy of certificate to be prima facie evidence of its contents.
- 298. Who are members and who stockholders of a corporation.
- 299. When member dies successor to be elected.

Corpora-
tion
defined.

283. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.

NOTE.—“A corporation is a body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same notwithstanding the change of individuals who compose it, and is for certain purposes considered as a natural person.”—Angell & Ames on Corporations, Sec. 1. Citing Browne's Civil Law, p. 99; Civil Code of Louisiana, Tit. 10, Ch. 1, Art. 418; 2 Kent Com., p. 215. “A corporation,” says Chief Justice Marshall, in *Dartmouth College vs. Woodward*, 4 Wheat., p. 636, “is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use.” In the *Providence Bank vs. Billings*, 4 Pet., p. 562, the learned Chief Justice says: “The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.” Bouvier defines a corporation as: “A body consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of its members.”—Bouv. L. D., Title “Corporation.” At the expiration of the time prescribed by law for the existence of a corporation it is dissolved; and it is said that upon a dissolution in this mode, “all the consequences of dissolution in any other mode, such as forfeiture of property, extinguishment of debts, abatement of suits, etc., ensue, unless, as is usual, they are provided against.”—Angell & Ames on Corporations, Sec. 778a; *Bank of Mississippi vs. Wren*, 3 Smedes & M., p. 791; *Commercial Bank vs. Lockwood*, 2 Haring (Del.), p. 8.

284. Corporations are either public or private. Public corporations are formed or organized for the

What are
public and
private
corpora-
tions.

government of a portion of the State; private corporations are formed for the purpose of religion, benevolence, education, art, literature, or profit.

NOTE.—Generally speaking, public corporations are counties, cities, and towns, existing for public purposes; private corporations are for banks, insurance, roads, canals, etc., where the stock is owned by individuals, but their use may be public.—*Bonaparte vs. Camden R. R. Co.*, 1 Bald. C. C., p. 223. "Public corporations are the auxiliaries of the Government in the important business of municipal rule. * * Private corporations are indisputably the creatures of public policy, and in the popular meaning of the term may be called public; but yet, if the whole interest does not belong to the Government (as if the corporation is created for the administration of civil or municipal power), the corporation is private."—*Angell & Ames on Corporations*, Sec. 31. A bank created by the Government for its own use, but the stock of which is owned in whole or in part by private persons, is a private corporation.—*Miners' Bank vs. United States*, 1 Green, Iowa, p. 553. A turnpike-company, in which the State holds stock, is a private corporation.—*Turnpike Co. vs. Wallace*, 8 Watts, p. 316. In the *Bank of the United States vs. Planters' Bank of Georgia*, 9 Wheat., p. 907, the State was interested as one of the corporators, yet it was held a private corporation; and in the *State Bank of South Carolina vs. Gibbs*, 3 McCord, p. 377, it was held that the bank was a private corporation, although the State owned the whole interest. After an elaborate review of the authorities upon this subject, the learned authors of *Angell & Ames on Corporations* state the general rule to be "that when the sovereign becomes a member of a joint stock corporation, the right of sovereignty, with respect to the transactions of the company, is divested, and the character is assumed of a private citizen. But where a corporation is composed exclusively of officers of the Government having no personal interest in it, or with its concerns, and only acting as the organs of the State in effecting a great public work, it is a public corporation."—*A. & A. on C.*, Sec. 32; *Sayre vs. Northwestern T. Co.*, 10 Leigh, p. 454; *Cal. Constitution*, Art. IV, Sec. 31.

Corpora-
tions, how
formed.

285. Private corporations may be formed by the voluntary association of any five or more persons, for the purposes and in the manner prescribed in this

Article. A majority of such persons shall be citizens of this State. Married women may become corporators, officers, and members of religious, benevolent, art, literary, or educational corporations.

NOTE.—See Stats. 1858, p. 264, Sec. 2; 1858, p. 57; 1859, p. 347; 1851, p. 523; 1861, p. 607; 1861, p. 567; 1858, p. 87; 1853, p. 169; 1857, p. 75; 1859, p. 281; 1862, p. 199; 1866, p. 743; 1866, p. 752; 1863, p. 624.

mm **286.** The purposes for which private corporations may be formed are the following, and none other :

For what
purpose
private
corpora-
tions are
formed.

1. Fire, marine, life, health, accident insurance;
2. The insurance of the lives of domestic animals;
3. Construction, conduct, and maintenance of railroads, and telegraph lines in connection therewith;
4. Construction, conduct, and maintenance of street railroads, plank roads, turnpikes, common wagon roads;
5. Construction, conduct, and maintenance of bridges, ferries, wharves, chutes, piers;
6. The establishment, conduct, and maintenance of express or stage lines;
7. Constructing, conducting, and maintaining telegraph lines;
8. Constructing and maintaining canals for navigation, and canals and ditches for drainage, agricultural, or mining purposes;
9. For navigating the ocean, or any of the waters of this State, with vessels propelled by sails, or in whole or in part by steam;
10. The purchase of lands for, and the distribution of homesteads;
11. The accumulation of funds for the purchase of real property, and for the erection of buildings and improvements thereon, for the benefit of the members thereof;
12. Accumulating savings, and loaning the funds of the members thereof;
13. Manufacturing, mining, mercantile, mechanical,

Same.

wharfing, docking, or chemical purposes, or for engaging in any other species of trade, business, or commerce;

14. The transacting of a printing and publishing business;

15. To supply water to the public;

16. The manufacture and supply of gas, or the supply of light or heat to the public by any other means;

17. The establishment, conduct, and maintenance of hotels, laundries, or theaters;

18. For the formation, conduct, and maintenance of District and County Agricultural Fairs;

19. The encouragement of, or business of, agriculture, horticulture, or stock raising;

20. The improvement of the breed of domestic animals;

21. The support, conduct, and maintenance of colleges of learning, or for any literary or scientific object, or for the promotion of any of the sciences or fine arts;

22. Acquiring, preserving, and conducting public libraries;

23. The organization and conduct of Chambers of Commerce, Boards of Trade, and Mechanic Institutes;

24. The support, conduct, and maintenance of homes and schools for orphans and foundlings, or either of them, or any person otherwise destitute;

25. For the purposes of religion, sociability, charity, or learning;

26. The purchase of lands for and the maintenance of cemeteries;

27. For banks of discount and deposit.

NOTE.—These subdivisions embrace every purpose for which corporations were authorized by the following Stats: 1866, pp. 743, 752, 469; 1861, p. 607; 1853, pp. 114, 160, 574; 1862, pp. 540, 199, 41; 1850, p. 347; 1868, pp. 539, 459, 204; 1870, pp. 130, 132, 364, 523, 660, 815, 402, 702, 419, 822; 1857, p. 121; 1864, p. 76; 1852, p. 171; 1859, pp. 104, 281; 1857, p. 75.

Am

287. Any existing corporation formed under any law of this State, for any purpose designated in any subdivision of the preceding section, may, at a meeting of its members or stockholders, called for that purpose, continue its existence, under Title I of this Part, or under the provisions of any subsequent Title particularly applicable thereto, as follows:

How corporations may continue their existence under this Code.

1. Public notice of such meeting, and of its object, must be given by publishing the same in a daily newspaper for two weeks, or a weekly newspaper for four weeks, successively, published in the county where the principal place of business of the corporation is. In lieu of the publication, personal notice may be given to each member or stockholder thereof;

2. Two thirds of the members, if there is no capital stock, and if there is a capital stock, then stockholders representing two thirds of it, must vote in favor of such continuance;

3. A copy of the proceedings of this meeting, giving the names of all persons present, the votes taken, the notice calling the meeting, and the proof of its publication or service, all duly certified by the President and Secretary of the corporation, must be filed in the offices of the Secretary of State and Clerk of the county where the articles of incorporation are on file. Thereafter such corporation is possessed of all the rights and powers, and subject to all the obligations, restrictions, and limitations provided in this Part applicable thereto, and its corporate existence is continued.

288. No corporation formed or existing before twelve o'clock, noon, of the day upon which this Code takes effect, is affected by the provisions of Part IV of Division First of this Code, unless such corporation elects to continue its existence under it as provided in Section 287; but the laws under which such corporations were formed and exist are applicable to all such

Existing corporations not affected.

corporations, and are repealed, subject to the provisions of this section.

NOTE.—*Heyneman vs. Blake*, 19 Cal., p. 579.

Name of instrument creating corporation.

289. The instrument by which a private corporation is formed is called "articles of incorporation."

Articles of incorporation, what to contain.

290. Articles of incorporation must be prepared, setting forth:

1. The name of the corporation;
- 2 The purpose for which it is formed;
3. The place where its principal business is to be transacted;
4. The term for which it is to exist, not exceeding fifty years;
5. The number of its Directors or Trustees, and the names and residences of those who are appointed for the first year;
6. The amount of its capital stock, and the number of shares into which it is divided;
7. If there is a capital stock, the amount actually subscribed, and by whom.

NOTE.—Stats. 1868, p. 539; *People vs. Chambers*, Supreme Ct. of Cal., 1871; *Carlisle vs. Cahawba & M. R. R. Co.*, 4 Ala., p. 70; *Field vs. Cooks*, 16 La. An., p. 154; *Williams vs. F. T. A. Association*, 26 Ind., p. 316; *Becht vs. Harris*, 4 Minn., p. 504; *Atlantic and Ohio R. R. Company vs. Sullivan*, 5 Ohio State R., p. 279; *Ferrana vs. Vanocelles*, 23 Ill., p. 459; *Walker vs. Devereux*, 4 Paige Ch., p. 229; *Valk vs. Crandall*, 1 Sand. Ch., p. 179; *Commonwealth vs. Central Pass Railway*, 52 Penn. St. R., p. 512; *People vs. Kingston and Middletown T. P. Co.*, 23 Wend., p. 193. There must be a substantial compliance with all the forms of law, by persons seeking to form a corporation, before the corporation can be considered in being.—*Harris vs. McGregor*, 29 Cal., p. 124. The omission of such acts as are declared necessary steps in the process of incorporation will be fatal, even collaterally, when the fact of incorporation can be questioned.—*Mokelumne H. M. Co. vs. Woodbury*, 14 Cal., p. 424. But the proceedings will not be held invalid for slight defects or omissions.—

S. V. Water Works vs. San Francisco, 22 Cal., p. 434. The failure to describe the place of business of the corporation as the "principal place of business," is a mere technical error, which does not invalidate.—*Ex parte S. V. Water Works*, 17 Cal., p. 132. A certificate of incorporation which does not set forth the name of the city or town and county in which the principal place of business of the corporation is to be located does not establish the existence of a corporation.—*Harris vs. McGregor*, 29 Cal., p. 124.

291. The articles of incorporation of any railroad, wagon road, or telegraph organization must also state:

Certain corporations to state further facts in articles.

1. The kind of road or telegraph intended to be constructed;

2. The place from and to which it is intended to be run, and all the intermediate branches;

3. The estimated length of the road or telegraph line;

4. That at least ten per cent of the capital stock subscribed has been paid in to the Treasurer of the intended corporation.

NOTE.—See note to Sec. 290.

Am 292. The articles of incorporation must be subscribed by five or more persons, three of whom must be citizens of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of grants of real property.

Five corporations, three to be citizens of the State, to sign articles and acknowledge the same.

293. Each intended corporation named in Section 291, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit:

Prerequisite to filing articles.

1. One thousand dollars per mile of railroads;

2. One hundred dollars per mile of telegraph lines;

3. Three hundred dollars per mile of wagon roads.

Amounts to be subscribed to be affixed.

NOTE.—Stats. 1853, pp. 114, 169; 1861, p. 607. See note to Section 294.

Prerequisite to filing articles of corporations for profit.

294. Before the articles of incorporation of any corporation referred to in the preceding section are filed, there must be paid for the benefit of the corporation, to a Treasurer elected by the subscribers, ten per cent of the amount subscribed.

NOTE.—Stats. 1850, p. 370, Secs. 156, 157; *People vs. Chambers*, Sup. Ct. Cal., 1871. The following authorities affirm the necessity of a strict compliance with the statutes in regard to payment of the percentage, in order to acquire an indefeasible title to corporate franchise, where such payment is made a condition, and establish the doctrine that no substitute, however equivalent or bona fide it may be, will satisfy the statutory requirement for money, or vest any right as against the State.—*Eaton vs. Aspinwall*, 19 N. Y., p. 119; *People vs. Troy House Co.*, 44 Barb., 634; *Haviland vs. Chace*, 39 Barb., p. 283; *Taggart vs. Western Maryland R. R. Co.*, 24 Md., p. 588; *People vs. Rensselaer Insurance Co.*, 38 Barb., p. 323; *Pater-son vs. Arnold*, 45 Penn. St. R., p. 415.

Oath of officer to subscription of stock and payment of ten per cent.

295. Before the Secretary of State issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the President, Secretary, or Treasurer named in the articles, that the required amount of the capital stock thereof has been actually subscribed, and ten per cent thereof actually paid to a Treasurer for the benefit of the corporation.

NOTE.—See note to Sec. 294.

To file articles with County Clerk and Secretary of State, and receive certificate.

296. Upon the filing of the articles of incorporation in the office of the County Clerk of the county in which the business of the company is to be transacted, and a copy thereof with the Secretary of State, the Secretary of State must issue to the corporation, over the great seal of the State, a certificate that such articles, containing the required statement of facts, have been filed in his office; and thereafter the persons signing the same, and their associates and assigns, are a body politic and corporate, by the name stated

in the certificate, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or in this Part otherwise specially provided.

Term of
existence.

NOTE.—As the law stood prior to the adoption of the Code, corporations had a legal existence from the date of filing the certificate of incorporation in the County Clerk's office.—Mokelumne Hill Mining Co. vs. Woodbury, 14 Cal., p. 424.

297. A copy of any articles of incorporation filed in pursuance of this Chapter, and certified by the Secretary of State, must be received in all the Courts and other places as primary evidence of the facts therein stated.

Certified
copy of
certificate
to be prima
facie
evidence
of its
contents.

NOTE.—Stats. 1862, p. 199; 1853, p. 83; 1850, p. 370, Sec. 158; 1861, p. 566, Sec. 17.

298. The owners of shares in a corporation which has a capital stock are called stockholders. If a corporation has no capital stock, the corporators and their successors are called members.

Who are
members
and who
stockhold-
ers of a
corporation.

299. If a member of a corporation dies, resigns, or is removed, a majority of the remaining members may elect another in his place.

When
members
die succes-
sors to be
elected.

ARTICLE II.

BY-LAWS, DIRECTORS, ELECTIONS, AND MEETINGS.

SECTION 301. Adoption of by-laws, when, how, and by whom.

302. Directors, election of, etc.

303. By-laws may provide for what.

304. By-laws recorded and how amended.

305. How many and who to be Directors.

306. Corporation at first meeting to elect Directors and adopt by-laws.

307. Elections, how conducted.

308. Organization of Board of Directors, etc.

309. Dividends to be made from surplus profits.

310. Removal from office of Directors, etc.

311. Justice of the Peace may order meeting when.

312. Majority of stock must be represented, and a majority vote together, otherwise it is fraudulent.

SECTION 313. All stock may be represented in votes.

314. Election may be postponed.

315. Complaints and quo warranto and proceedings thereon regarding elections.

316. False certificate, report, or notice to make officers liable.

317. Meeting by consent to be valid.

318. Proceedings at meeting to be binding.

319. Meetings, where held.

320. When no provision in by-laws for regular meetings, special meetings, how called.

Adoption
of by-laws,
when, how,
and by
whom.

aw 301. Every corporation formed under this Title must, at a meeting of its stockholders or members, to be held within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the Constitution and laws of this State. Notice of such meeting, by order of the acting President, specifying its object, must be published two weeks in some newspaper published in the county where the meeting is to be held; or if none is published therein, then in a paper published in an adjoining county. In the adoption of the by-laws, each stockholder has as many votes as he holds shares of stock; if there is no capital stock, each member has one vote. A majority of all the subscribed capital stock, or of the members, if there is no capital stock, is necessary to adopt the by-laws, or any one of them.

NOTE.—Stats. 1850, p. 348, Sec. 7; 1862, p. 540; 1861, p. 85. The power to make by-laws is incident to corporate existence. It exists without express provisions conferring it.—*City of London vs. Vanacker*, 1 Ld. Raymond, p. 496; *Child vs. Hudson Bay Co.*, 2 P. Wms., p. 207; *Martin vs. Nashville Building Association*, 2 Clow., p. 418. At common law the power was exercised by the entire body of corporators (*Rex vs. Westwood*, 7 Bing., pp. 1, 90; 2 *Dow & C.*, p. 21), but need not be exercised in writing (*Union Bank vs. Ridgley*, 1 Harr. & G., p. 324), nor under seal.—*Dunston vs. Imperial Gas Co.*, 3 Barn. & Ad., p. 125. The power to prescribe by-laws extends only to the officers and members of the corporation, and upon them are binding and obligatory.—*Mechanics' Band vs. Smith*, 19 Johns., p. 115; *Worcester vs. Essex Bridge Co.*, 7 Gray, p. 457; *Anacosta Tribe vs. Murbach*, 13 Md., p.

91; *Carne vs. Brigham*, 39 Me., p. 35; *German Evangelical Congregation of Lafayette vs. Pressler*, 17 La. An., p. 127; *Palmyra vs. Morton*, 25 Mo., p. 593; *Bank of Wilmington and Brandywine vs. Wollaston*, 3 Harring., p. 90; *State vs. Overton*, 4 Zab., p. 435; *Dodwell vs. University of Oxford*, 2 Vent., p. 33. By-laws, duly enacted under express authority of statute, have the same force as though they were enacted by the Legislature.—*McDermott vs. Board of Police*, 5 Abb. Pr., p. 422; *Brick Presbyterian Church vs. Mayor of N. Y.*, 5 Cowen, p. 538. The same power that enacts may repeal by-laws.—*King vs. Ashwell*, 12 East., p. 22; *Rex vs. Westwood*, 4 Barn. & C., p. 781; 7 Dowl. & R., p. 267; *Smith vs. Nelson*, 18 Vt., pp. 511-550. By-laws cannot contravene the Constitution; for instance, a corporation cannot make a by-law which would impair the obligation of contracts (*Howard vs. Savannah*, T. Charl., p. 173; *People vs. Crockett*, 9 Cal., p. 112), nor the general principles and policy of the common law (*Hayden vs. Noyes*, 5 Conn., p. 391; *Rex vs. Tappenharn*, 3 East., p. 186; *Taylor vs. Griswold*, 2 Green, p. 222; *Phillips vs. Wickham*, 1 Paige, p. 590), nor good morals or public policy (*Sayre vs. Louisville Union Benevolent Association*, 1 Duv., p. 143), nor the statute law.—*Kennebec and Portland R. R. Co. vs. Kendall*, 31 Me., p. 470; *Seneca Co. Bank vs. Lamb*, 26 Barb., p. 595. But by-laws may be valid further regulating a subject already regulated by statute.—*Rogers vs. Jones*, 1 Wend., p. 237. By-laws must be reasonable.—*People vs. Thoop*, 12 Wend., p. 183; *People vs. Medical Society of Erie*, 24 Barb., p. 570. A by-law may be good in part, and will be sustained, in so far as it is good, if the good and bad clauses are capable of separation (*Amesbury vs. Bowditch Mut. Fire Ins. Co.*, 6 Gray, p. 596; *Rogers vs. Jones*, 1 Wend., p. 237); but if the by-law is entire, and the part which is void influences the whole, the by-law is void.—*Oxford vs. Wildgoose*, 2 Lev., p. 293; *Guilford vs. Clark*, 2 Vent., p. 248. The real owner of stock in a corporation is entitled to represent it at meetings of the stockholders; and the fact that he does not appear as the owner upon the books of the company does not exclude him from so doing. The New York cases establishing a different doctrine are based upon a statute which makes the books of the corporation the only evidence as to the ownership of the stock.—*Allen vs. Hill*, 16 Cal., p. 113.

But see Section 312 of this Code, which modifies the rule laid down in *Allen vs. Hill*.

Directors,
election
of, etc.

302. The Directors of a corporation must be elected annually by the stockholders or members, and if no provision is made in the by-laws for the time of election, the election must be held on the first Tuesday in June. Notice of such election must be given, and the right to vote determined as prescribed in Section 301.

NOTE.—Section 314 contains provisions relative to the proceedings to be had if the election is not held on the day fixed by the by-laws or Sec. 302.

By-laws
may
provide for
what.

Am 303. A corporation may, by its by-laws, where no other provision is specially made, provide:

1. The time, place, and manner of calling and conducting their meetings;
2. The number of stockholders or members, or the quantity of stock constituting a quorum;
3. The number of shares which entitles the stockholders respectively to one or more votes;
4. The mode of voting by proxy;
5. The time and place of the annual election for Directors, and the mode and manner of giving notice thereof;
6. The mode of selling shares for the non-payment of assessments or installments;
7. The compensation and duties of officers;
8. The tenure of office of subordinate officers; and,
9. Suitable penalties for violations of by-laws, not exceeding, in any case, one hundred dollars for any one offense.

NOTE.—Stats. 1850, p. 347, Sec. 7.

By-laws
recorded
and how
amended.

Am 304. All by-laws adopted must be certified by the officers of the corporation, and filed and recorded in the Recorder's office of the county where the principal place of business of the corporation is located. The by-laws thus adopted must not be altered or amended, except at a special meeting of the stockholders or members, to be called by the Directors for that purpose, specifying in the order the proposed

amendments; and a two-third vote of all the subscribed capital stock, or of the members, is necessary to adopt the same. And the amendments thus adopted must be certified and recorded in the same manner as the original by-laws.

NOTE.—Hall vs. Crandall, 29 Cal., p. 567.

305. The corporate powers, business, and property of all corporations formed under this Title must be exercised, conducted, and controlled by a Board of not less than five nor more than eleven Directors, to be elected from among the holders of stock; or where there is no capital stock, then from the members of such corporation. A majority of the Directors must be citizens of this State. Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof. Unless a quorum is present and acting, no business performed or act done is valid as against the corporation. Whenever a vacancy occurs in the office of Director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the Board.

How many
and who
to be
Directors.

NOTE.—Stats. 1853, p. 169; 1866, pp. 743-752; 1850, pp. 178, 347, Secs. 159, 345, 347; 1862, p. 199; 1863, p. 624. The corporate powers of a corporation can be exercised by the Trustees only when duly assembled and acting as a Board.—Gashwiler vs. Willis, 33 Cal., p. 11; Blood vs. Marcuse, 38 Cal., p. 593; this Code, Secs. 308, 354. * Any transfer of stock sufficient to pass the property entitles the transferee to vote in the election of Directors, unless some specific mode of transfer is made necessary by statute or by-laws.—People vs. Devlin, 17 Ill., p. 84. (See Sec. 312 of this Code.) The mortgagor of stock in a corporation is entitled to vote upon the stock at elections, and if necessary the Court will compel the mortgagee or his trustee to give a power of attorney to the mortgagor to vote at such election.—Vowell vs. Thompson, 3 Cranch. Circ. Ct., p. 428. Where stock is held by an individual as trustee for the corporation, such trustee

cannot vote upon it.—U. S. vs. Columbian Ins. Co., 2 Cranch. Circ. Ct., p. 266; *Ex parte* Holmes, 5 Cowen, p. 426; in the matter of Baker, 6 Wend., 509; *Ex parte* Desdoity, 1 Wend., p. 98. Where stock stands in the name of A, "Cashier," the latter word is mere description, and B is not entitled to vote thereon on proof that he is A's successor as such Cashier.—Matter of Mohawk and Hudson River R. R. Co., 19 Wend., p. 135. Stocks or shares standing on the books of a company in the name of the corporation itself cannot be voted upon by one of its officers.—5 Cowen, p. 434; Mousseaux vs. Urquhart, 19 La. An., p. 482.

Am
Corporation at first meeting to elect Directors and adopt by-laws.

306. At the first meeting called, as soon as the by-laws are adopted, unless it is provided that the officers named in the articles of incorporation shall continue until a certain other date, Directors must be elected, a majority of the subscribed capital stock, or of the members, being necessary to a choice.

Am
Elections, how conducted.

307. All elections must be by ballot, and unless otherwise prescribed by the by-laws, a majority of the subscribed capital stock or of the members is necessary to a choice.

NOTE.—Stats. 1853, p. 159; 1861, p. 607; 1850, pp. 347, 281; 1870, p. 577.

Organization of Board of Directors, etc.

308. Immediately after their election, the Directors must organize by the election of a President, who must be one of their number, a Secretary, and Treasurer. They must perform the duties enjoined on them by law and the by-laws of the corporation. A majority of the Directors is a sufficient number to form a Board for the transaction of business, and every decision of a majority of the Directors forming such Board, made when duly assembled, is valid as a corporate act.

NOTE.—The persons who are the Trustees of a corporation, in their official character as Trustees, when not acting as a Board, have no authority, independent of that conferred by the corporation, to execute a deed of the corporate property. The corporate powers can be exercised by the Board of Trustees only when duly assembled and acting as a Board.—Gashwiler vs.

Willis, 33 Cal., p. 11; Blood vs. Marcuse, 38 Cal., p. 593. Note to Sec. 305 of this Code.

309. The Directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section, the Directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the Directors at the time, or were not present when the same did happen), are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such Directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence.

Dividends
to be made
from
surplus
profits.

NOTE.—Stats. 1850, p. 348; 1861, p. 607, Sec. 50; 1861, p. 626, Sec. 56; 1866, pp. 747-757; 1853, p. 89, Secs. 13, 14.

310. No Director shall be removed from office, unless by a vote of two thirds of the members, or of stockholders holding two thirds of the capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal. Meetings of stockholders for this purpose may be called by the President, or by a majority of

Removal
from office
of Direc-
tors, etc.

Same. the Directors, or by members or stockholders holding at least one half of the votes. Such calls must be in writing, and addressed to the Secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. If the Secretary refuse to give the notice, or if there is none, the call may be addressed directly to the members or stockholders, and be served as a notice, in which case it must specify the time and place of meeting. The notice must be given in the manner provided in Section 301 of this Title, unless other express provision has been made therefor in the by-laws. In case of removal, the vacancy may be filled by election at the same meeting.

Justice of the Peace may order meeting when.

311. Whenever, from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any Justice of the Peace of the county where such corporation is established, may, on written application of three or more of the stockholders or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the Justice may in the same warrant direct such person to preside at such meeting until a Clerk is chosen and qualified, if there is no other officer present legally authorized to preside thereat.

NOTE.—Stats. 1850, p. 347.

Majority of stock must be represented, and a majority vote together, otherwise it is fraudulent.

312. At all elections or votes had for any purpose there must be a majority of the subscribed capital stock, or of the members, represented, either in person or by proxy in writing. Every person acting therein, in person or by proxy or representative, must be a member thereof or a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election. Any vote or election had other than in accordance

with the provisions of this Article is voidable at the same instance of absent stockholders or members, and may be set aside by petition to the District Court of the county where the same was held. Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election or majority vote had—such adjournment and the reasons thereof being recorded in the journal of proceedings of the Board of Directors.

NOTE.—Stats. 1861, p. 607, Secs. 5, 6; 1853, p. 169, Sec. 8.

Am 313. The shares of stock of an estate of a minor, insane or deceased person, may be represented at all elections and meetings of the corporation by the legal representative of the person holding the same. All stock may be represented in votes.

NOTE.—Stats. 1861, pp. 610, 567; 1853, p. 169; 1863, p. 89; 1862, p. 190.

314. If from any cause an election does not take place on the day appointed in the by-laws, it may be held on any day thereafter as is provided for in such by-laws, or to which such election may be adjourned or ordered by the Directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered by the Directors, a meeting may be called by the stockholders, as provided in Section 310 of this Article. Election may be postponed.

NOTE.—Stats. 1850, p. 347, Sec. 168; 1853, p. 88; 1862, p. 199; 1861, p. 610, 1863, p. 624.

315. Upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the District Judge of the district in which such election is held must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire Complaints and quo warranto and proceedings thereon regarding elections.

into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. Before any proceedings are had under this section, five days' notice thereof must be given to the adverse party, or those to be affected thereby.

NOTE.—Stats. 1850, p. 347, Sec. 15.

False certificate, report, or notice to make officers liable.

316. Any officer of a corporation who makes or gives a certificate, official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, and who knew or had full opportunity to know the same to be false, is liable for all the debts of the corporation contracted while he was a stockholder or officer thereof; and if more than one violate the provisions of this section in concert, they are jointly and severally liable.

NOTE.—Stats. 1853, p. 90, Sec. 19; 1861, p. 626, Sec. 55; 1866, p. 747, Sec. 16.

Meeting by consent to be valid.

317. When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed.

NOTE.—Stats. 1850, p. 347, Sec. 10.

Proceedings at meeting to be binding.

318. The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.

NOTE.—Stats. 1850, p. 347, Sec. 11.

Meetings, where held.

319. The meetings of the stockholders and Board of Directors of a corporation must be held at its office or principal place of business.

320. When no provision is made in the by-laws for regular meetings of the Directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each Director by the Secretary, on the order of the President, or if there be none, on the order of two Directors.

When no provision in by-laws for regular meetings, special meetings, how called.

CHAPTER II.

CORPORATE STOCK.

ARTICLE I. STOCK AND STOCKHOLDERS.

II. ASSESSMENT OF STOCK.

ARTICLE I.

STOCK AND STOCKHOLDERS.

SECTION 322. Liabilities of stockholders. They may be released, when.

323. Certificates, how and when issued.

324. Transfer of shares.

325. Transfer of shares held by married women, etc. Dividends payable to married women.

326. Non-resident stockholders. Bonds.

322. Each stockholder or member of any corporation is severally, individually, and personally liable for such proportion of all its debts and liabilities as the amount of stock or shares owned by him in such corporation bears to the whole of the subscribed capital stock or shares of the corporation, for the recovery of which joint or several actions may be instituted and prosecuted; and in any such action against any of the stockholders or members of a corporation, the Court must ascertain and determine the proportion of the debt which is the subject of the suit for which each of the stockholders or members who are defendants in the action are severally liable, and judgment must be

Liabilities of stockholders.

They may
be
released,
when.

given severally in conformity therewith. If any stockholder or member of a corporation pays his proportion of any debt due by such corporation, he is released and discharged from any further individual or personal liability for such debt. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder, but the pledgor or person or estate represented is the stockholder.

NOTE.—Stats. 1853, p. 87, Secs. 16, 17; 1863, p. 766; 1866, p. 758, Sec. 17; Const. of Cal., Art. IV, Sec. 36; Mokelumne Hill Canal Co. vs. Woodbury, 14 Cal., p. 265; Robinson vs. Bidwell, 22 Cal., p. 383; Davidson vs. Rankin, 34 Cal., p. 505. This section of the Constitution is not self-executing—legislation is necessary to give it effect.—French vs. Teschemaker, 24 Cal., p. 518; Borland vs. Hildreth, 26 Cal., p. 256. The Legislature cannot say that the stockholder shall not be liable for any of the debts of the corporation, but may say that he shall be liable for his portion, and what that portion shall be. The same rate of liability must be imposed upon all the stockholders. An Act of the Legislature authorizing the formation of corporations without attaching to the stockholders an individual liability, would be unconstitutional.—French vs. Teschemaker, 24 Cal., p. 518; Larrabee vs. Baldwin, 35 Cal., p. 155. Each corporator is liable as a principal debtor.—Mokelumne Hill Canal Company vs. Woodbury, 14 Cal., p. 518.

Certifi-
cates, how
and when
issued.

323. All corporations for profit must issue certificates for stock when fully paid up, signed by the President and Secretary, and may provide, in their by-laws, for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide.

NOTE.—Stats. 1861, p. 614, Sec. 14.

Transfer of
shares.

324. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative,

and delivery of the certificate; but such transfer is Same. not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer.

NOTE.—Stats. 1853, pp. 85, 169, Sec. 13; 1861, p. 607, Sec. 12; 1862, pp. 111, 199, Sec. 21. A transfer of stock is not good as against third persons, unless the fact of the transfer is entered upon the books of the company.—Weston vs. Bear River and Auburn W. and M. Co., 5 Cal., p. 186; People vs. Elmore, 36 Cal., p. 653. Under the chattel mortgage Act of 1857, a mortgage of shares of stock was held valid without a transfer upon the books of the company.—Ede vs. Johnson, 15 Cal., p. 53. A railroad company cannot refuse to enter the transfer of stock on their books on the grounds that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock at the date of its transfer.—People vs. Crockett, 9 Cal., p. 112.

325. Shares of stock in corporations held or owned by a married woman may be transferred by her, her agent, or attorney, without the signature of her husband, in the same manner as if such married woman were a *femme sole*. All dividends payable upon any shares of stock of a corporation held by a married woman may be paid to such married woman, her agent, or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman, touching any shares of stock of any corporation owned by her, is valid and binding without the signature of her husband, the same as if she were unmarried.

Transfer of shares held by married women, etc.

Dividends payable to married women.

NOTE.—Stats. 1861, p. 607, Sec. 12.

Am 326. In all transfers of shares of stock in corporations, on behalf of owners residing out of the State, the President, Secretary, or Directors of such corpora-

Non-resident stockholders.

Bonds.

tion, before entering such transfer on the books of the corporation or issuing the certificate therefor to the transferee, must require from such attorney, or from the person claiming under such transfer, a bond of indemnity, with two sureties, satisfactory to the officers of the corporation, or if not so satisfactory, then approved by the District Judge of the district in which the principal office of the corporation is situated, conditioned to protect such corporation against any liability to the legal representatives of the owner of such stock, in case of his or her death before such transfer; and in case of refusal to furnish such bonds upon request, such transfer is utterly void as against the corporation.

NOTE.—Stats. 1862, p. 110, Sec. 12.

ARTICLE II.

ASSESSMENTS OF STOCK.

SECTION 331. Directors may levy assessments.

332. Limitation. How levied.

333. Levy of assessment. Old assessment remaining unpaid.

334. What order shall contain.

335. Notice of assessment. Form.

336. Publication and service.

337. Delinquent notice. Form.

338. Contents of notice.

339. How published.

340. Jurisdiction acquired, how.

341. Sale to be by public auction.

342. Highest bidder to be the purchaser.

343. In default of bidders, corporation may purchase.

344. Disposition of stock purchased by corporation.

345. Extension of time of delinquent sale.

346. Assessments shall not be invalidated.

347. Action for recovery of stock, and limitation thereof.

348. Affidavits of publication. Affidavits of sale. To be filed.

349. Waiver of sale. Action to recover assessment.

Am 331. The Directors of any corporation formed under the laws of this State, for the purpose of paying

expenses, conducting business, or paying debts, may levy and collect assessments upon the capital stock thereof, in the manner and form and to the extent provided herein.

Directors
may levy
assess-
ments.

NOTE.—Stats. 1861, p. 41; 1864, p. 492.

332. No one assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows:

Limitation.

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount;

How levied

2. The Directors of railroad corporations may assess the capital stock in installments of not more than ten per cent per month, unless in the articles of incorporation it is otherwise provided;

3. The Directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper.

333. No assessment must be levied while any portion of a previous one remains unpaid, unless:

Levy of
assessment

1. The power of the corporation has been exercised in accordance with the provisions of this Article for the purpose of collecting such previous assessment;

Old
assessment
remaining
unpaid.

2. The collection of the previous assessment has been enjoined; or

3. The assessment falls within the provisions of either the first, second, or third subdivision of Section 332.

334. Every order levying an assessment must specify the amount thereof, when, to whom, and where

What order shall contain. payable; fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

Notice of assessment. 335. Upon the making of the order, the Secretary shall cause to be published a notice thereof, in the following form :

Form. (Name of corporation in full. Location of principal place of business). Notice is hereby given, that at a meeting of the Directors, held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom, and where). Any stock upon which this assessment shall remain unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and, unless payment is made before, will be sold on the (day appointed), to pay the delinquent assessment, together with costs of advertising and expenses of sale.

(Signature of Secretary, with location of office.)

NOTE.—Stats. 1868, p. 540.

Publication and service. *Ans* 336. The notice must be published once each week for four successive weeks, in some daily or weekly paper published at the place designated in the articles of incorporation as the principal place of business, and also in some paper published in the county in which the works of the corporation are situated, if a paper is published therein. If the works of the corporation are not situated within some State or Territory of the United States, then publication in a paper of the place where situated is not necessary. If there is no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in the newspaper published in an adjoining county. The notice may be

served by delivering a copy thereof, certified by the Secretary, to each stockholder personally; and in case of such service upon all the stockholders of the corporation, no notice by publication is necessary, but such personal notice is sufficient.

337. If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the Secretary must, unless otherwise ordered by the Board of Directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form :

Delinquent
notice.

(Name in full. Location of principal place of business). NOTICE.—There is delinquent upon the following described stock, on account of assessment levied on the (date), (and assessments levied previous thereto, if any), the several amounts set opposite the names of the respective shareholders, as follows : (Names, number of certificate, number of shares, amount). And in accordance with law (and an order of the Board of Directors, made on the [date], if any such order shall have been made), so many shares of each parcel of such stock as may be necessary, will be sold, at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

Form.

(Name of Secretary, with location of office.)

NOTE.—Stats. 1864, p. 492.

338. The notice must specify every certificate of stock, the number of shares it represents, and the amount due thereon, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon, together with the fact that the certificates for such shares have not been issued, must be stated.

Contents of
notice.

339. The notice, when published in a daily paper, must be published for ten days, excluding Sundays and

How
published.

holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale.

Jurisdiction
acquired,
how.

340. By the publication of the notice, the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale.

Sale to be
by public
auction.

341. On the day, at the place, and at the time appointed in the notice of sale, the Secretary must, unless otherwise ordered by the Directors, sell or cause to be sold at public auction, to the highest bidder for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising, in addition to the assessment.

Highest
bidder to
be the
purchaser.

342. The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation, on payment of the assessment and costs.

In default
of bidders,
corporation
may
purchase.

343. If, at the sale of stock, no bidder offers the amount of the assessments and costs and charges due, the same may be bid in and purchased by the corporation, through the Secretary, President, or any Director thereof, at the amount of the assessments, costs, and charges due; and the amount of the assessments, costs, and charges must be credited as paid in

full on the books of the corporation, and entry of the transfer of the stock to the corporation must be made on the books thereof. While the stock remains the property of the corporation it is not assessable, nor must any dividends be declared thereon; but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation. Same.

344. All purchases of its own stock made by any corporation vest the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting. Disposition of stock purchased by corporation.

345. The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be extended from time to time for not more than thirty days, by order of the Directors, entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates. Extension of time of delinquent sale.

346. No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew. Assessments shall not be invalidated

Action for
recovery of
stock, and
limitation
thereof.

347. No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made.

Affidavits
of publica-
tion.

Affidavits
of sale.

To be filed.

Waiver of
sale.

Action to
recover
assessment.

Am 348. The publication of notices required by this Article may be proved by the affidavit of the printer, foreman, or principal clerk of the paper in which the same was published; and the affidavit of the Secretary or auctioneer is primary evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom and for what price, and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same, certified by the Secretary thereof, are primary evidence of the facts therein stated. Certificates, signed by the Secretary and under the seal of the corporation, are primary evidence of the contents thereof.

349. On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the Board of Directors may elect to waive further proceedings under this Chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.

*Ambsan Tally
Act of March 9th 1870
No 2, 1869-70 p 229*

NOTE.—This Article is founded on the statute of 1866, p. 460. See, also, Stats. 1868, p. 540, Sec. 3; 1870, p. 29. 7/2/07

CHAPTER III.

CORPORATE POWERS.

ARTICLE I. GENERAL POWERS.

II. RECORDS.

III. EXAMINATION OF CORPORATION.

IV. JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

ARTICLE I.

GENERAL POWERS.

SECTION 354. Powers of corporations.

355. Limitation of powers.

356. Banking expressly prohibited.

357. Misnomer does not invalidate instrument.

358. Corporation to organize within one year.

359. Increasing and diminishing capital stock, how.

560. Corporations may acquire real property, and how much.

354. Every corporation, as such, has power:

1. Of succession, by its corporate name, for the period limited; and when no period is limited, perpetually;
2. To sue and be sued, in any Court;
3. To make and use a common seal, and alter the same at pleasure;
4. To purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this Part;
5. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation;
6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock;

Powers of corporations.

Same.

7. To admit stockholders or members, and to sell their stock or shares for the payment of assessments or instalments;

8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation.

NOTE.—The common law annexes to a corporation when created certain incidents and attributes. Kyd (1 Kyd, p. 69,) mentions five of these as necessarily and inseparably belonging to every corporation: 1. To have perpetual succession, and hence all aggregate corporations have power necessarily implied of admitting members in the room of such as are removed by death or otherwise; 2. To sue and be sued, implead and be impleaded, grant and receive, by its corporate name, and do all other acts as natural persons may do; 3. To purchase lands and hold them for the benefit of themselves and their successors; 4. To have a common seal; and, 5. To make by-laws, which are considered as private statutes, for the government of an incorporated company.—2 Kent's Com., p. 224; 1 Cooley's Black., p. 474; Angell & Ames on Corporations, Sec. 110. These powers and capacities may be limited by the law under which the corporation is formed, for the Legislature may create a corporation in disregard of the rules of the common law; and a corporation thus created depends for its existence, powers, and capacities upon the law of its creation and its objects.—*Penobscot Corporation vs. Lamson*, 16 Me., p. 224; *Com. of Roads vs. McPherson*, 1 Speers, p. 218; *Beatty vs. Knowles*, 4 Pet., p. 152; *Russel vs. Topping*, 5 McClean, p. 194; *New London vs. Brainard*, 22 Conn., p. 522; *Caldwell vs. City of Alton*, 33 Ill., p. 416. Corporations are bound to follow the letter of their charter, and can exercise no power unless granted to them, or absolutely necessary to carry out the power so granted.—*Smith vs. Moore*, 2 Cal., p. 524. The express powers of a corporation must be exercised in the manner pointed out by statute; but the powers merely incidental thereto may be exercised by its officers and agents.—*Smith vs. Eureka Flour Mill Co.*, 6 Cal., p. 1; *Union Water Co. vs. Murphy's Flat Fluming Co.*, 22 Cal., p. 629; *Carey vs. P. & C. Petroleum Co.*, 33 Cal., p. 696; *McSpedon vs. Mayor, etc.*, 7 Bosw., p. 601; 20 How. Pr., p. 395; *Hood vs. N. Y. and N. H. R. R. Co.*, 22 Conn., p. 502. The contract of a corporation created for a particular pur-

pose with special powers does not bind it, if it appears from the express provisions of the statute under which the corporation was formed, or by necessary and reasonable inference from its enactment, that the contract was *ultra vires*, that is, that the Legislature meant that such a contract should not be made, or that it was not within the powers, express or implied, to be exercised by the corporation.—South Yorkshire, etc., Co. vs. Great Northern Railway Co., 9 Exch., pp. 55, 84; Mayor, etc., of Norwich vs. Norfolk Railway Co., 4 Ellis & B., p. 397; 30 Eng. Law and Eq., p. 120. In the Miners' Ditch Co. vs. Zellerbach, 37 Cal., p. 543, the authorities bearing upon the doctrine of *ultra vires* are collated and examined with great care. In summing up the Court say:

“The term *ultra vires*, whether with strict propriety or not, is, also, used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. Cognate questions were very thoroughly and ably discussed by Mr. Justice Comstock and Mr. Justice Selden in *Bissell vs. The Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y., p. 262, the latter dissenting from many of the views of the former, but both agreeing in the views just expressed with reference to acts *ultra vires* in the last sense mentioned. Mr. Justice Comstock says: ‘Circumstances may, and often do exist, which estop the offender from taking advantage of his

own wrong. The contract may be entered into on the other side without any participation in the guilt and without any knowledge even of the vice which contaminates it. An innocent person may part with value or otherwise change his situation upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract—in other words, if, as I have shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party, who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is, also, *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.' Again: 'That term (*ultra vires*) is of a very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations.'—*Ib.*, p. 275. Mr. Justice Selden (whose views the appellant's counsel seems to approve) says in the same case: 'There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee but in those of any subsequent holder, because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.'"

A mining corporation which buys more land than the law allows, acts in the exercise of a legitimate power, but to an improper extent; the corporation commits a wrong, but one which can only be inquired into by the State, and it does not thereby lose its rights as against a trespasser.—Whitman Mining Co. vs. Baker, 3 Nevada, p. 386; Cal. State Tel. Co. vs. Alta Tel. Co., 22 Cal., p. 398; Union Water Co. vs. Murphy's Flat Fluming Co., 22 Cal., p. 620. The corporate powers of a corporation can be exercised by the Board of Trustees only when duly assembled and acting as a Board.—Gashwiler vs. Willis, 33 Cal., p. 11; Blood vs. Marcuse, 38 Cal., p. 590; this Code, Secs. 305-308.

355. In addition to the powers enumerated in the preceding section, and to those expressly given in that Title of this Part under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given. Limitation of powers.

NOTE.—Smith vs. Moore, 2 Cal., p. 524. Corporations, with their express powers, take, by implication, such powers as are necessary to the exercise of those expressly conferred.—New England Fire and Marine Ins. Co. vs. Robinson, 25 Ind., p. 536; Barry vs. Merchant's Exchange Co., 1 Sand. Ch., p. 280; Madison, etc., Plank Road Co. vs. Wattertown, etc., Plank Road Co., 5 Wis., p. 173; Brady vs. Mayor, etc., of Brooklyn, 1 Barb., p. 584; Jackson vs. Brown, 5 Wend., p. 590. Many powers and capacities are tacitly annexed to a corporation duly created, but they are such only as are necessary to carry into effect the purposes for which it was formed. The specification of certain powers operates as a restraint to such subjects only, and is an implied prohibition of the exercise of other and distinct powers.—People vs. Utica Ins. Co., 15 Johns., p. 385; Halstead vs. Mayor, etc., of N. Y., 3 N. Y., p. 430.

356. No corporation shall create or issue bills, notes, or other evidences of debt, upon loans or otherwise, for circulation as money. Banking expressly prohibited.

NOTE.—Cal. Const., Art. IV, Sec. 35. The power to issue notes and bills for circulation as money is expressly excluded. The right to issue them in all other proper cases must be inferred as an incident to the ex

press powers or objects of the corporation.—*Smith vs. Eureka Flour Mills Co.*, 6 Cal., p. 1. A corporation may bind itself by note and mortgage.—*Rowe vs. Table Mt. W. Co.*, 10 Cal., p. 441; *Union Water Co. vs. Murphy's Flat Fluming Co.*, 22 Cal., p. 620.

Misnomer
does not
invalidate
instrument

357. The misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended.

NOTE.—The general rule in respect to errors in naming a corporation in written instruments is that the name must be in substance the true name, but need not be identical in every word and syllable.—*Mayor, etc., of Lynne*, 10 Co., p. 1226. Transposition of the words composing the name is not important if it is evident what is intended.—*Chadsey vs. McCreery*, 27 Ill., p. 253. A conveyance by or to a corporation is not invalidated by a variation from the precise name of the corporation, if the true name can be collected from the instrument or is shown by proper averments.—*Kentucky Seminary vs. Wallace*, 15 B. Monr., p. 35; *Douglass vs. Branch Bank at Mobile*, 19 Ala. (N. S.), p. 659; *Bank of Tennessee vs. Burke*, 1 Caldw., p. 623. It is well settled that the omission of a part of the name of a corporation, when the name consists of several words, if the corporation intended can be identified, will not vitiate a grant made to or an act done by such corporation.—*People vs. S. B. Q. M. Co.*, 39 Cal., p. 514; *Angell & Ames on Corporations*, Sec. 99; *Newport Mec. Man. Co. vs. Starbird*, 10 N. H., p. 123; *People vs. Potter*, 35 Cal., p. 110; *First Parish vs. Cole*, 3 Pick., p. 232; *Inhabitants vs. String*, 5 Hals., p. 323; *Dauphin Turnpike R. Co. vs. Meyers*, 6 S. & R., p. 12. A tax assessed against the "Souhegan Nail, Cotton, and Woolen Factory," and entered in the tax list as against the "Souhegan Nail, Cotton, and Woolen Corporation," was held valid, it appearing that there was no other corporation of that name in the town.—*Souhegan Nail, etc., Factory vs. McConihe*, 7 N. H., p. 309; *People vs. S. B. Q. M. Co.*, 39 Cal., p. 514. Accuracy is required in stating the name of a corporation in criminal proceedings.—*Regina vs. Rex*, 2 Eng. Railway Cases, p. 613. But see *People vs. Potter*, 35 Cal., p. 110.

358. If a corporation does not organize and commence the transaction of its business or the construc-

tion of its works within one year from the date of its incorporation, its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this Part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the State on information of the Attorney General.

Corpora-
tion to
organize
within one
year.

NOTE.—An inquiry as to the right of a company to act as a corporation can only be had at the suit of the State, on information by the Attorney General.—Rondell vs. Fay, 32 Cal., p. 354. The irregular or non-performance of acts relating to the organization of a corporation can only be investigated in a direct proceeding instituted for that purpose, and not in a collateral action.—Spring Valley W. Co. vs. San Francisco, 22 Cal., p. 441; McFarland vs. Triton Ins. Co., 4 Denio, p. 392; Eaton vs. Aspinwall, 19 N. Y., p. 119; Searsburg T. Co. vs. Colter, 6 Vt., p. 323; Dunning vs. New Albany and Salem R. R. Co., 2 Ind., p. 437; Judah vs. American Live Stock Insurance Company, 4 Ind., p. 388. But as it is an indispensable allegation in an action brought by a corporation that the plaintiff is a corporation, it results, from the logic of pleading, that the opposite party may deny the allegation, in which event the plaintiff must prove that it in good faith claims to be a corporation, and is doing business as such.—O. & V. R. R. Co. vs. Plumas County, 37 Cal., p. 361.

Am 359. Every corporation may increase or diminish its capital stock as in this section provided:

Increasing
and dimin-
ishing
capital
stock, how.

1. By a majority vote of the Directors there may be called a meeting of the stockholders, to be convened for the purpose of increasing or of diminishing the capital stock;

2. Personal notice of the time and place of such meeting, and the object thereof, must be served on each stockholder resident in this State; or, in lieu thereof, the notice must be published in every issue of a newspaper published in the county where the princi-

Same. pal place of business is located, for four weeks successively;

3. The notice must also contain the amount to which it is proposed to increase or diminish the capital stock;

4. The capital stock must in no case be diminished to an amount less than the indebtedness of the corporation or the estimated cost of the works which it may be the object or purpose of the corporation to construct;

5. At least four fifths of all the capital stock must be represented at such meeting, and at least two thirds of the entire capital stock must vote in favor of such increase or diminution before the same is effected;

6. A certificate, signed and verified by the Chairman and Secretary of the meeting, must be made, showing a strict compliance with all the requirements of this section, the amount to which the capital stock has been increased or diminished, the amount of stock (and by whom held) represented at the meeting, the vote by which the object was accomplished, the amount of capital stock actually paid in, and the amount of all debts and liabilities of the corporation, and how secured;

7. This certificate must be subscribed by a majority of the Directors, and duplicates made, one to be filed in the office of the County Clerk and one in the office of the Secretary of State, as provided for original articles of incorporation, and thereupon the capital stock is so increased or diminished.

NOTE.—The preceding sections of this Article were taken from Stats. 1850, p. 347, Secs. 1, 2, 3, 4, 5, 6. See, also, Stats. 1853, p. 88; 1861, p. 85; 1862, pp. 540, 199, 110; 1866, p. 747; 1868, p. 325.

Corporations may acquire real property, and how much.

360. No corporation shall acquire or hold any more real estate than may be absolutely necessary for the use of the business conducted or the construction of their works, except as specially provided. A corpora-

tion organized for any purpose specified in Subdivisions 3, 4, 5, 7, 8, and 15, of Section 286, may acquire real property as provided in Title VII, Part III, Code of CIVIL PROCEDURE, when needed for the uses and purposes therein mentioned. Same.

NOTE.—Whitman Mining Co. vs. Baker, 3 Nevada, p. 386; Wood vs. Truckee T. P. Co., 24 Cal., p. 474; Cal. State Tel. Co. vs. Alta Tel. Co., 22 Cal., p. 398; Union Water Co. vs. Murphy's Flat Fluming Co., 22 Cal., p. 620. See note to Sec. 354 of this Code.

ARTICLE II.

RECORDS.

SECTION 377. Records—of what, and how kept.

378. Other records to be kept by corporations for profit, and others.

377. All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their Directors, members, or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done; who were present, and who absent; and, if requested by any Director, member, or stockholder, the time shall be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, the protest of any Director, member, or stockholder, to any action or proposed action, must be entered in full—all such records to be open to the inspection of any Director, member, stockholder, or creditor of the corporation. Records—
of what,
and how
kept.

NOTE.—Stats. 1853, pp. 90, 169; 1861, p. 607.

Other records to be kept by corporations for profit, and others.

378. In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the "Stock and Transfer Book," in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale, or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such Stock and Transfer Book must be kept open to the inspection of any stockholder, member, or creditor.

NOTE.—The People vs. Crockett, 9 Cal., p. 112; Smith vs. Forty-nine and Fifty-six Quartz Mining Co., 14 Cal., p. 242.

ARTICLE III.

EXAMINATION OF CORPORATIONS, ETC.

SECTION 382. Examination into affairs of corporation, how made by officers of State.

383. Examination made by the Legislature.

384. Chapter and Article may be repealed.

Examination into affairs of corporation, how made by officers of State.

382. The Attorney General or District Attorney, whenever and as often as required by the Governor, must examine into the affairs and condition of any corporation in this State, and report such examination, in writing, together with a detailed statement of facts, to the Governor, who must lay the same before the Legislature; and for that purpose the Attorney General or District Attorney may administer all necessary oaths to the Directors and officers of any corporation, and may examine them on oath in relation to the

affairs and condition thereof, and may examine the books, papers, and documents belonging to such corporation, or appertaining to its affairs and condition.

NOTE.—This Article was from the Stats. 1850, p. 350, Secs. 29, 30.

383. The Legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this State at all times; and, for that purpose, any committee appointed by the Legislature, or either branch thereof, may administer all necessary oaths to the Directors, officers, and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of all keys, books, papers, and documents by summary process, to be issued on application to any Court of record or any Judge thereof, under such rules and regulations as the Court may prescribe.

Examina-
tion made
by the
Legisla-
ture.

384. The Legislature may at any time amend or repeal this Part, or any Title, Chapter, Article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.

Chapter
and Article
may be
repealed.

NOTE.—Sec. 31, Art. IV, of the Cal. State Constitution, is as follows: "Corporations may be formed under general laws, but shall not be created by special Act except for municipal purposes. All general laws and special Acts passed pursuant to this section may be altered from time to time, or repealed." Under that provision in the tenth section of the first Article of the Constitution of the United States which prohibits a State from enacting any law "impairing the obligation

of contracts," it has been settled that the charter of a private corporation is an executed contract between the Government and the corporators, and that the Legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation, judicially ascertained and declared.—*Fletcher vs. Peck*, 6 Cranch, p. 88; *Dartmouth College vs. Woodward*, 4 Wheat., p. 518; *Wales vs. Stetson*, 2 Mass., p. 143; *Regents of the University of Md. vs. Williams*, 9 Gill. & J., p. 402; *Payne vs. Baldwin*, 3 Smedes & M., p. 661; *Aberdeen Female Academy vs. Aberdeen*, 3 Smedes & M., p. 645; *Bush vs. Shipman*, 4 Scam., p. 190; 2 Kent's Com., pp. 305, 306; *Angell & Ames on Corporations*, Sec. 767. In consequence of this construction, it has become usual for Legislatures, in acts of incorporation, either to make the duration of the charter conditional, or to reserve the power to alter, modify, or repeal the charter at pleasure; "and as the power of modification and repeal is thus made a qualifying part of the grant of franchises, the exercise of that power cannot of course impair the obligation of the grant."—*Angell & Ames on Corporations*, Sec. 767; 2 Kent's Com., pp. 306, 307. And to the same effect are the following cases: *Dartmouth College vs. Woodward*, 4 Wheat., 708; *Enfield Toll Bridge Co. vs. Connecticut River Co.*, 7 Conn., p. 53; *Miners' Bank of Dubuque vs. United States*, 1 Morris, p. 482; in the matter of the *Reciprocity Bank*, 29 Barb., p. 369. Section 384 was inserted in this Code out of an abundance of caution, and not because it was deemed necessary, for there can be but little doubt that the constitutional provision quoted at the head of this note enters into and becomes part of the contract, thereby reserving to the Legislature the right to repeal, impair, or alter any law relative to the formation of corporations, even though the result reached would be the dissolution of every corporation organized within the State.

ARTICLE IV.

JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

SECTION 388. Franchise may be treated as property, and sold under execution.

389. Purchaser to transact business of corporation.

390. Purchaser may recover penalties, etc.

391. Corporation to retain powers after sale.

SECTION 392. Redemption of franchise.

393. When proceedings under execution may be had.

Am 388. For the satisfaction of any judgment against a corporation organized for profit, its franchise and all the rights and privileges thereof may be levied upon and sold under execution, in the same manner and with like effect as any other property.

Franchise may be treated as property, and sold under execution.

NOTE.—Franchises are special privileges conferred by government on individuals, which do not belong to the citizens of the country generally by common right. The persons to whom such privileges are granted hold them in personal trust, and therefore they cannot be transferred by forced sale nor by voluntary assignment, unless by permission of the government, and even then if a special mode of transfer is pointed out, that mode must be followed.—Wood vs. Truckee T. P. Co., 24 Cal., p. 486; Munroe vs. Thomas, 5 Cal., p. 470; Thomas vs. Armstrong, 7 Cal., p. 286; Redfield on Railways, pp. 419-422; Angell & Ames on Corporations, Sec. 4. By Sec. 388 the government consents that franchises may be levied upon and sold under execution, in like manner as other property is levied upon and sold.

389. The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into the possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same, as hereinafter provided.

Purchaser to transact business of corporation.

390. The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same, and may use the name of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had is a bar to any subsequent action by or on behalf of the corporation for the same.

Purchaser may recover penalties, etc.

Corpora-
tion to
retain
powers
after sale.

391. The corporation whose franchise is sold, as in this Article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures, as before such sale.

Redemp-
tion of
franchise.

392. The corporation may, at any time within one year after such sale, redeem the franchise, by paying or tendering to the purchaser thereof the sum paid therefor, with ten per cent interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender the franchise and all the rights and privileges thereof revert and belong to the corporation, as if no such sale had been made.

When pro-
ceedings
under
execution
may be
had.

393. The levy and sale of any franchise under execution may be had in any county in which the President or any Director, the Treasurer or the Secretary of the corporation may reside, or in which the corporation has its principal place of business.

NOTE.—This Article from Stats. 1850, p. 347, Secs. 20, 26, 28.

CHAPTER IV.

EXTENSION AND DISSOLUTION OF CORPORATIONS.

SECTION 399. Proceedings to disincorporate.

400. On dissolution, Directors to be Trustees for creditors.

401. Any corporation may extend its corporate existence, how.

402. How corporations may continue their existence.

403. Title I to apply to all corporations, with certain exceptions.

Proceed-
ings to
disincor-
porate.

399. The dissolution of corporations is provided for:

1. If involuntary—in Chapter V of Title X, Part II, of the Code of Civil Procedure;

2. If voluntary—in Title VI, Part III, of the Code of Civil Procedure.

400. Unless other persons are appointed by the Court, the Directors or managers of the affairs of such corporation at the time of its dissolution are Trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation.

On dissolution,
Directors
to be
Trustees
for
creditors.

NOTE.—At common law, upon the civil death of a corporation, its real estate reverts to the grantor (*Knight vs. Wells*, 1 Lut., p. 519; *State Bank vs. State*, 1 Blackf., p. 267; *Bingham vs. Weiderwax*, 1 Comstock, p. 509; 1 Bl. Com., p. 484; 2 Kyd on Corp., p. 516; 2 Kent's Com., p. 307; *Angell & Ames on Corporations*, Sec. 779), the personal property vests in the State (*id.*), and the debts due to and from it are extinguished (*Rex vs. Passamore*, 3 T. R., p. 241; *Bank of Mississippi vs. Wrenn*, 3 Smedes & M., p. 791; *Miami Ex. Co. vs. Gano*, 13 Ohio, p. 269; *White vs. Campbell*, 5 Humph., p. 38; 1 Bl. Com., p. 484; 2 Kent's Com., p. 307; *Angell & Ames on Corporations*, Sec. 779). But the learned authors of *Angell & Ames on Corporations*, Section 779a, say of the common law rule that "it has in fact become obsolete and odious;" that "practically it has never been applied in England to insolvent or dissolved moneyed corporations; and in this country its unjust operation upon the rights of both creditors and stockholders of this class of corporations is almost invariably arrested by general or special statutes. Indeed, at this day it may well be doubted whether, in the view at least of a Court of equity, it has any application other than to public and eleemosynary corporations, with which it had its origin. The sound doctrine of equity is that the capital or property and debts due to a banking, trading, and other moneyed corporations constitute a fund pledged to the payment of the dues of the creditors and stockholders, and that a Court of equity will lay hold of this fund, into whosoever hands it may pass, and collect and apply it to the purposes of the trust."

Ans 401. Every corporation heretofore formed, for any purpose enumerated in this Title for which corporations may be formed, for a period of time less than

Any corporation may extend its corporate existence, how.

Same. fifty years, may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension must be made at a meeting of the stockholders or members, after such order of the Directors and notice thereof, with such amount of capital stock or number of members represented, and such affirmative vote thereof, as required herein for the increase or diminution of the capital stock, and filing a certificate thereof in the same offices where their articles of incorporation are filed.

How corporations may continue their existence.

See 402. All corporations may continue their existence for an additional period, not exceeding fifty years, by filing a certificate, verified by the affidavit of the President and Secretary, setting forth that, at a meeting of four fifths of the members or stock, and on a two thirds vote thereof, it was determined to continue such corporation for such additional length of time; the meeting of the stockholders or members to be had after notice thereof, published for four weeks in some newspaper in the county where the principal office of the corporation is located, giving the time and place of meeting; or, in lieu thereof, personal notice of such time and place of meeting may be served on all stockholders or members resident in this State—the notice to specify the object of the meeting and the length of time for which it is proposed to continue the corporation.

Title I to apply to all corporations, with certain exceptions.

403. The provisions of this Title are applicable to every corporation, unless such corporation is excepted from its operation, or unless a special provision is made in relation thereto inconsistent with some provision in this Title, in which case the special provision prevails.

NOTE.—

An Act in relation to foreign corporations.

[Approved April 1, 1872.]

[Enacting clause.]

SECTION 1. Every corporation heretofore created by the laws of any other State and doing business in this State shall, within one hundred and twenty days after the passage of this Act, and any corporation hereafter created and doing business in this State, within sixty days from the time of commencing to do business in this State, designate some person residing in the county in which the principal place of business of said corporation in this State is, upon whom process issued by authority of or under any law of this State may be served, and within the time aforesaid shall file such designation in the office of the Secretary of State; and a copy of such designation, duly certified by said officer, shall be evidence of such appointment; and it shall be lawful to serve on such person so designated any process issued as aforesaid. Such service shall be made on such person in such manner as shall be prescribed in case of service required to be made on foreign corporations, and such service shall be deemed to be a valid service thereof.

SEC. 2. Every corporation created by the laws of any other State which shall fail to comply with the provisions of the first section of this statute shall be denied the benefit of the statutes of this State limiting the time for the commencement of civil actions.

SEC. 3. Every corporation created by the laws of any other State which shall comply with the provisions of the first section of this statute shall be entitled to the benefit of the statutes of this State limiting the time for the commencement of civil actions.

TITLE II.

INSURANCE CORPORATIONS.

CHAPTER I. *General Provisions.*

II. *Fire and Marine Insurance Corporations.*

III. *Mutual Life, Health, and Accident Insurance Corporations.*

CHAPTER I.

GENERAL PROVISIONS.

SECTION 414. Subscriptions to capital stock opened, and how collected.

415. Purchase and conveyance of real estate.

416. Policies, how issued and by whom signed.

417. Dividends, of what, and when declared.

418. Directors liable for loss on insurance in certain cases.

419. Capital to be at least one hundred thousand dollars.

Subscriptions to capital stock opened, and how collected.

414. After the Secretary of State issues the certificate of incorporation, as provided in Article I, Chapter I, Title I, of this Part, the Directors named in the articles of incorporation must proceed in the manner specified, or in their by-laws, or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; to levy assessments and installments thereon, and to collect the same, as in Chapter II of Title I provided.

Purchase and conveyance of real estate.

415. No insurance corporation must purchase, hold, or convey real estate, except as hereinafter set forth, to wit:

1. Such as is requisite for its accommodation in the convenient transaction of its business, not exceeding in value one hundred and fifty thousand dollars;

2. Such as is conveyed to it, or to any person for it, by way of mortgage or in trust, or otherwise, to secure or provide for the payment of loans previously contracted, or for moneys due;

3. Such as is purchased at sales upon deeds of trust or judgments obtained or made for such loans or debts;

4. Such as is conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

All such real estate so acquired, which is not requisite for the accommodation of such corporation in the transaction of its business, must be sold and disposed of

within five years after such corporation acquired title to the same. No such real estate must be held for a longer period than five years, unless the corporation first procures a certificate from the Insurance Commissioner that the interest of the corporation will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the Insurance Commissioner directs in the certificate. Same.

416. All policies made by insurance corporations must be subscribed by the President or Vice President, or in case of the death, absence, or disability of those officers, by any two of the Directors, and countersigned by the Secretary of the corporation. All such policies are as binding and obligatory upon the corporation as if executed over the corporate seal. Policies, how issued and by whom signed.

417. The Directors of every insurance corporation, at such times as their by-laws provide, must make, declare, and pay to the stockholders dividends of so much of the net profits of the corporate business and interest on capital invested as to them appears advisable; but the moneys received and notes taken for premium on risks which are undetermined and outstanding at the time of making the dividend must not be treated as profits, nor divided, except as provided in Chapter II of this Title. Dividends, of what, and when declared.

NOTE—Stats. 1865-6, p. 748, Sec. 21.

418. If any insurance corporation is under liabilities for losses to an amount equal to its capital stock, and the President or Directors, after knowing the same, make any new or further insurance, the estates of all who make such insurance, or assent thereto, are severally and jointly liable for the amount of any loss which takes place under such insurance. Directors liable for loss on insurance in certain cases.

NOTE—Stats. 1865-6, p. 743, Sec. 13.

Capital to
be at least
one
hundred
thousand
dollars.

419. No company, corporation, or association shall hereafter be formed or organized under the laws of this State, for the transaction of business in any kind of insurance, except on live stock, without a subscribed capital equal at least to one hundred thousand dollars in United States gold coin, twenty-five per cent whereof must be paid in previous to the issue of any policy, and the remainder by monthly or quarterly installments within twelve months from the day of filing the certificate of incorporation. Nor must any individual or person be permitted to transact business as agent of any non-resident person or corporation, whether foreign or domestic, in any kind of insurance, except on live stock, unless such person or corporation possesses available cash assets, exclusive of stock notes, to the amount of at least one hundred thousand dollars in United States gold coin, over and above all liabilities.

CHAPTER II.

FIRE AND MARINE INSURANCE CORPORATIONS.

SECTION 424. Payment of subscriptions. Capital to be all paid in twelve months.

425. Certificate of capital stock paid up to be filed, and when.

426. Property which may be insured.

427. Funds may be invested, how.

428. Rate of risk.

429. Amounts to be reserved before making dividends.

430. Amounts to be reserved by companies with less than two hundred thousand dollars capital.

Payment of
subscriptions.
Capital to
be all paid
in twelve
months.

424. The entire capital stock of every fire or marine insurance corporation must be paid up in cash within twelve months from the filing of the articles of incorporation, and no policy of insurance must be issued or risk taken until twenty-five per cent of the whole capital stock is paid up.

425. The President and a majority of the Directors must, within thirty days after the payment of the twenty-five per cent of the capital stock, and also within thirty days after the payment of the last installment or assessment of the capital stock limited and fixed, prepare, subscribe, and swear to a certificate setting forth the amount of the fixed capital and the amount thereof paid up at the times respectively in this section named, and file the same in the office of the County Clerk of the county where the principal place of business of the corporation is located, and a duplicate thereof, similarly executed, with the Insurance Commissioner.

Certificate of capital stock paid up to be filed, and when.

426. Every corporation formed for fire or marine insurance, or both, may make insurance on all insurable interests within the scope of its articles of incorporation, and may cause itself to be reinsured.

Property which may be insured.

NOTE.—The same person cannot act as agent for two corporations in making a contract between them, such as a contract by one corporation reinsuring another. A contract so made cannot be enforced.—New York Central Ins. Co. vs. National Protection Ins. Co., 14 N. Y., p. 85; Utica Ins. Co. vs. Toledo Ins. Co., 17 Barb., p. 132. Nor can a sub-agent of an insurance company issue a policy or make an agreement on the part of the company to issue a policy to himself.—Bentley vs. Columbia Ins. Co., 17 N. Y., p. 421.

427. Every fire and marine insurance corporation may, by its Board of Directors or as the by-laws direct, invest its funds in loans upon real or personal property, or in the purchase of stocks, bonds, or other securities, but no loan must be made on the stock of the corporation as security.

Funds may be invested, how.

428. Fire and marine insurance corporations, or either, must never take on any one risk, whether it is a marine insurance or an insurance against fire, a sum exceeding one tenth part of their capital actually paid in, without reinsuring the excess above one tenth.

Rate of risk.

NOTE.—If a corporation voluntarily, and without

fraud or misrepresentation, insure for a sum beyond that allowed by law, the policy is not thereby rendered void.—*Williams vs. N. E. Mutual Fire Ins. Co.*, 31 Me., p. 219; *Fuller vs. Boston Mut. Fire Ins. Co.*, 4 Metc., p. 206; *Hoxsie vs. Providence, etc., Ins. Co.*, 6 R. I., p. 517.

Amounts
to be
reserved
before
making
dividends.

429. No corporation transacting fire or marine insurance business under the laws of this State must make any dividends, except from profits remaining on hand after retaining, unimpaired:

1. The entire subscribed capital stock;
2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks;
3. A fund equal to one half of the amount of all premiums on fire risks and marine time risks not terminated at the time of making such dividend;
4. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes.

NOTE.—The Court, at the suit of a stockholder in a moneyed corporation, will restrain the payment of a dividend when the Directors are about to misapply the funds of the corporation in paying such dividend, there being in fact no money earned for such purpose.—*Carpenter vs. N. Y. and N. H. R. R. Co.*, 5 Abb. Pr., p. 277.

Amounts
to be
reserved by
companies
with less
than two
hundred
thousand
dollars
capital.

430. No fire or marine insurance corporation, with a subscribed capital of less than two hundred thousand dollars, must declare any dividends, except from profits remaining on hand after reserving:

1. A sum necessary to form, with the subscribed capital stock, the aggregate sum of two hundred thousand dollars;
2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks;
3. A fund equal to one half the amount of all pre-

miums on fire risks and marine time risks not terminated at the time of making such dividend; Same.

4. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes.

NOTE.—See note to Section 429.

CHAPTER III.

MUTUAL LIFE, HEALTH, AND ACCIDENT INSURANCE CORPORATIONS.

SECTION 437. Capital stock. Guarantee Fund.

- 438. Of what Guarantee Fund shall consist.
- 439. What constitutes, and deficiency in fixed capital.
- 440. Declaration of fixed capital to be filed.
- 441. Guarantee notes and interest, how disposed of.
- 442. Insured to be entitled to vote, when.
- 443. May invest in what securities.
- 444. Number of Directors may be altered, how.
- 445. Limitations to the holding of stock and in other particulars may be provided for in by-laws.
- 446. Premiums, how payable.
- 447. Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when. How estimated.
- 448. No stamp required on accident insurance contract.

437. Every corporation formed for the purpose of mutual insurance on the lives or health of persons, or against accidents to persons for life or any fixed period of time, or to purchase and sell annuities, must have a capital stock of not less than one hundred thousand dollars. It must not make any insurance upon any risk or transact any other business as a corporation until its capital stock is fully paid up in cash, nor until it has also obtained a Fund, to be known as a "Guarantee Fund," of not less than two hundred and fifty thousand dollars, as is hereinafter provided. If more than the requisite amount is subscribed, the stock must be dis-

Capital
stock.

Guarantee
Fund.

tributed pro rata among the subscribers. Any subscription may be rejected by the Board of Directors or the committee thereof, either as to the whole or any part thereof, and must be, so far as rejected, without effect.

Of what
Guarantee
Fund shall
consist.

438. The Guarantee Fund mentioned in the preceding section must consist of the promissory notes of solvent parties, approved by the Board of Directors and by each other, payable to the corporation or its order, and at such times, in such modes, and in such sums, with or without interest, and conformable in all other respects to such requirements as the Board of Directors prescribe; but the amount of the notes given by any one person must not exceed in the whole the sum of five thousand dollars, exclusive of interest. Such notes must be payable absolutely and at the option of the corporation; they must be negotiable, and may be indorsed and transferred, or converted into cash, or otherwise dealt with by the corporation, at its discretion, without reference to any contingency of losses or expenses. Such notes, or the proceeds thereof, must remain with the corporation as a fund for the better security of persons dealing with it, and constitute the assets of the corporation, liable for all its debts, obligations, and indebtedness next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings, over and above its expenses, losses, and liabilities, shall have accumulated in cash, or securities in which the net earnings have been invested, to a sum which, with the capital stock, is equal to the aggregate of the original amounts of the Guarantee Fund and of the capital stock.

What constitutes,
and
deficiency
in fixed
capital.

439. The sum accumulated as provided in the preceding section, together with the capital stock, shall become and remain the fixed capital of the corporation, not subject to division among the stockholders or

parties dealing with it, or to be expended in any manner otherwise than may be required in payment of the corporation's debts and actual expenses, until the business of the corporation is closed, its debts paid, and its outstanding policies and obligations of every kind canceled or provided for; and if from any cause a deficiency at any time occurs in such fixed capital, no further division of profits must take place until such deficiency has been made up. Same.

440. Whenever the fixed capital of the corporation is obtained as hereinbefore provided, the President of the corporation and its Actuary, or its Secretary, if there is no Actuary, must make a declaration in writing, sworn to before some Notary Public, of the amount of such fixed capital, and of the particular kinds of property composing the same, with the nature and amount of each kind, which must be filed with the original articles of incorporation, and a copy, certified by the County Clerk, must be published for at least four successive weeks, in a newspaper published in the county where the principal business of the corporation is situated. Upon the filing of such declaration the Guarantee Fund is discharged of its obligations, and all notes of the Fund remaining in the control of the corporation, and not affected by any lien thereon, or claim of that nature, must be surrendered by it to the makers thereof, respectively, or other parties entitled to receive the same. Declaration of fixed capital to be filed.

Am 441. Until the Guarantee Fund is discharged from its obligations, as provided in the preceding section, no note must be withdrawn from the Fund, unless another note of equal solvency is substituted therefor, with the unanimous approval of the Board of Directors then in office, and of all other parties liable on the rest of the notes comprising the Guarantee Fund. The corporation must allow a commission of five per Guarantee notes and interest how disposed of.

Same. cent per annum on all such guarantee notes while outstanding, and also interest on all moneys paid on such notes by the parties liable thereon, at the rate of twelve per cent per annum, payable half yearly until repaid by the corporation. But such rate of interest may, from time to time, at intervals of not less than one year, be increased or reduced by the Board of Directors, so as to conform to the then current rates of interest.

Insured to be entitled to vote, when. 442. After the filing of the declaration of the fixed capital, as in this Article provided, the holders of policies of life insurance for the term of life, on which the premiums are not in default, may vote at the election of Directors, and have one vote for each one thousand dollars insured by their policies, respectively.

May invest in what securities. 443. The number of Directors specified in the articles of incorporation may be altered from time to time during the existence of the corporation by resolution, at the annual meeting of a majority of those entitled to vote at the election of Directors, but the number must never be reduced below five.

Number of Directors may be altered, how. *Am* 444. Life, health, and accident insurance corporations may invest their capital stock as follows:

1. In loans upon unencumbered and improved real estate within the State of California, which shall be worth at the time of the investment at least fifty per cent more than the sum loaned;
2. In the purchase of or loans upon interest-bearing stocks, bonds, and other securities of the United States, and of the States thereof;
3. In the purchase of or loans upon interest-bearing bonds of any incorporated city, or city and county, in the State of California;
4. In the purchase of or loans upon any stocks of companies and corporations formed under the laws of this State, except mining stocks, which shall have, at

the time of the investment, a value, in the City and Same. County of San Francisco, of not less than sixty per cent of their par value, and shall be rated as first class securities.

But no loans shall be made on any securities specified in Subdivisions 2, 3, and 4 of this section in any amount beyond sixty per cent of the market value of the securities, nor shall any loan be made on the stock of the corporation making the loan.

445. The corporation may, by its by-laws, limit the number of shares which may be held by any one person, and make such other provisions for the protection of the stockholders and the better security of those dealing with it as to a majority of the stockholders may seem proper, not inconsistent with the provisions of this Title or Part.

Limitations to the holding of stock, and in other particulars, may be provided for in by-laws.

446. All premiums must be payable wholly in cash, or one half or a greater proportion in cash, and the remainder in promissory notes bearing interest, as may be provided for by the by-laws. Agreements and policies of insurance made by the corporation may be upon the basis of full or partial participation in the profits, or without any participation therein, as may be provided by the by-laws and agreed between the parties.

Premiums, how payable.

447. Every life insurance corporation doing business in this State, or formed under the provisions of this Part, must, on or before the first Monday in January of each year, furnish the Insurance Commissioner the necessary data for determining the valuation of all its policies outstanding on the thirty-first day of December next preceding; which valuation must be based upon the rate of mortality as established by the American Experience Life Table. The rate of interest to be assumed must be four and one half per cent per annum.

Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when.

How estimated.

No stamp
required on
accident
insurance
contract.

448. No stamp is required nor stamp duty exacted on any contract of insurance, when such contract insures against accident which may result in injury or death.

449 } added
450 }
451 }

TITLE III.

RAILROAD CORPORATIONS.

CHAPTER I. *Officers and Corporate Stock.*

II. *Enumeration of Powers.*

III. *Business, how Conducted.*

CHAPTER I.

OFFICERS AND CORPORATE STOCK.

SECTION 454. Directors to be elected, when.

455. Additional provisions in assessment and transfer of stock.

456. Corporations may borrow money and issue bonds.
Limitation of amount.

457. To provide a Sinking Fund to pay bonds.

458. Capital stock to be fixed.

459. Certificate of payment of fixed capital stock.

Directors to
be elected,
when.

454. Directors of railroad corporations may be elected at a meeting of the stockholders other than the annual meeting, as a majority of the fixed capital stock may determine, or as the by-laws may provide; notice thereof to be given as provided for notices of meetings to adopt by-laws in Article II, Chapter I, Title I, of this Part.

Additional
provisions
in assess-
ment and
transfer of
stock.

455. No stock in any railroad corporation is transferable until all the previous calls or installments thereon have been fully paid in; nor is any such transfer valid, except as between the parties thereto, unless at least twenty per cent has been paid thereon and cer-

tificates issued therefor, and the transfer approved by the Board of Directors.

456. Railroad corporations may borrow, on the credit of the corporation and under such regulations and restrictions as the Directors thereof, by unanimous concurrence, may impose, such sums of money as may be necessary for constructing and completing their railroad, and may issue and dispose of bonds or promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent per annum; and may also issue bonds or promissory notes, of the same denomination and rate of interest, in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto. The amount of bonds or promissory notes issued for such purposes must not exceed, in all, the amount of their capital stock; and to secure the payment of such bonds or notes, they may mortgage their corporate property and franchise.

Corporations may borrow money and issue bonds.

Limitation of amount.

457. The Directors must provide a Sinking Fund, to be specially applied to the redemption of such bonds on or before their maturity, and may also confer on any holder of any bond or note so issued, for money borrowed or in payment of any debt or contract for the construction and equipment of such road, the right to convert the principal due or owing thereon into stock of such corporation, at any time within eight years from the date of such bonds, under such regulations as the Directors may adopt.

To provide a Sinking Fund to pay bonds.

458. When, at any time after filing the articles of incorporation, it is ascertained that the capital stock therein set out is either more or less than actually required for constructing, equipping, operating, and maintaining the road, by a two-third vote of the stockholders the capital stock must be fixed, and a certifi-

Capital stock to be fixed.

cate thereof, and of the proceedings had to fix the same, must be made out and filed in the office of the Secretary of State.

Certificate
of payment
of fixed
capital
stock.

459. Within thirty days after the payment of the last installment of the fixed capital stock of any railroad corporation organized under this Title and Part, the President and Secretary and a majority of the Directors thereof must make, subscribe, and file in the office of the Secretary of State a certificate, stating the amount of the fixed capital stock, and that the whole thereof has been paid in. The certificate must be verified by the affidavit of the President and Secretary.

CHAPTER II.

ENUMERATION OF POWERS.

SECTION 465. Enumeration of powers:

1. To survey road.
2. May accept real estate.
3. May acquire real estate.
4. Lay out road, how wide.
5. Where may construct road.
6. May cross or connect roads.
7. May purchase land, timber, stone, gravel, etc.
8. Carry persons and freight.
9. Erect necessary buildings.
10. Regulate time and freights, subject to legislation.
11. Regulate force and speed.
466. Map and profile to be filed.
467. May change line of road.
468. Forfeiture of franchise. •
469. Crossings and intersections. Condemnation.
470. Not to use streets, alleys, or water in cities or towns, except by a two-third vote of the city or town authorities.
471. Railroads through cities not to charge fare to and from points therein.
472. When crossing railroads or highways, how other lands are acquired.
473. Corporations may consolidate. Publication of notice. Copy to be filed.

SECTION 474. State lands granted for use of corporations.

475. Grant not to embrace town lots.

476. Wood, stone, and earth may be taken from State lands.

477. Lands to revert to State, when.

478. Selections made, how proved and certified to.

485. Every railroad corporation has power:Enumera-
tion of
powers.

1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents, and employes may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto;

To survey
road.

2. To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it to aid and encourage the construction, maintenance, and accommodation of such railroad;

May accept
real estate.

3. To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road;

May
acquire
real estate.

4. To lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same;

Lay out
road, how
wide.

5. To construct their road across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch, or flume, which the route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch, or flume

Where may
construct
road.

thus intersected to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise;

May cross
or connect
roads.

6. To cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation, with the necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections, and connections, the same shall be ascertained and determined as is provided in Title VII, Part III, CODE OF CIVIL PROCEDURE;

May
purchase
land,
timber,
stone,
gravel, etc.

7. To purchase lands, timber, stone, gravel, or other materials, to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in Title VII, Part III, CODE OF CIVIL PROCEDURE, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the Directors so determine, as is provided hereinafter; but no such change must vary the general route of such road, as contemplated in its articles of incorporation;

Carry
persons
and freight.

8. To carry persons and property on their railroad, and receive tolls or compensation therefor;

Erect
necessary
buildings.

9. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures, and machinery for the accommodation and use of their passengers, freight, and business;

10. To regulate the time and manner in which passengers and property shall be transported, and the tolls

and compensation to be paid therefor within the limits prescribed by law, and subject to alteration, change, or amendment by the Legislature at any time;

Regulate
time and
freights,
subject to
legislation.

11. To regulate the force and speed of their locomotives, cars, trains, or other machinery used and employed on their road, and to establish, execute, and enforce all needful and proper rules and regulations for the management of its business transactions usual and proper for railroad corporations.

Regulate
force and
speed.

NOTE.—Stats. 1861, p. 614, Sec. 17.

466. Every railroad corporation in this State must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land acquired for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the Secretary of State; and also like maps of the parts thereof located in different counties, and file the same in the office of the Clerk of the county in which such parts of the road are, there to remain of record forever. The maps and profiles must be certified by the Chief Engineer, the Acting President and Secretary of such company, and copies of the same, so certified and filed, be kept in the office of the Secretary of the corporation, subject to examination by all parties interested.

Map and
profile to
be filed.

NOTE.—Stats. 1861, p. 621, Sec. 34.

467. If, at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the Directors may, as provided in Subdivision 7, Section 465, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are of file, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and

May
change line
of road.

must sell or relinquish the lands owned by them for the original location, within five years after such change. No new location, as herein provided, must be so run as to avoid any points named in their articles of incorporation.

NOTE.—Stats. 1861, p. 616, Sec. 18.

Forfeiture
of franchise

468. Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited.

NOTE.—Stats. 1861, p. 626, Sec. 54; 1870, p. 578.

Crossings
and inter-
sections.

469. Whenever the track of one railroad intersects or crosses the track of another railroad, whether the same be a street railroad, wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under Title VII, Part III, CODE OF CIVIL PROCEDURE, and the damages assessed and the right of way granted as in other cases.

Condemna-
tion.

NOTE.—Stats. 1862, p. 496.

Not to use
streets,
alleys, or
water, in
cities or
towns,
except by a
two-third
vote of the
city or town
authorities.

470. No railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third vote of the town or city authority from which the right must emanate.

471. No railroad corporation, other than street railroads, availing itself of the provisions of the preceding section and acquiring right of way from city authorities, must ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration from any point to another in the same city.

Railroads through cities not to charge fare to and from points therein.

NOTE.—Stats. 1861, p. 618, Sec. 21.

472. Whenever the track of such railroad crosses a railroad or highway, such railroad or highway may be carried under, over, or on a level with the track, as may be most expedient; and in cases where an embankment or cutting necessitates a change in the line of such railroad or highway, the corporation may take such additional lands and material as are necessary for the construction of such road or highway on such new line. If such other necessary lands cannot be had otherwise, they may be condemned as provided in Title VII, Part III, CODE OF CIVIL PROCEDURE; and when compensation is made therefor, the same becomes the property of the corporation.

When crossing railroads or highways, how other lands are acquired.

NOTE.—Stats. 1861, p. 616, Sec. 19.

473. Two or more railroad corporations may consolidate their capital stock, debts, property, assets, and franchises in such manner as may be agreed upon by their respective Boards of Directors. No such amalgamation or consolidation must take place without the written consent of the holders of three fourths in value of all the stock of each corporation; and no such amalgamation or consolidation must in any way relieve such corporation or the stockholders thereof from any and all just liabilities. In case of such amalgamation or consolidation, due notice of the same must be given, by advertisement for one month in at least one newspaper in each county, if there be one published

Corporations may consolidate.

Publication of notice.

Copy to be
filed.

therein, into or through which such roads run, and also for the same length of time in one paper published in Sacramento and in two papers published in San Francisco; and when the consolidation and amalgamation is completed, a copy of the new articles of incorporation must be filed in the office of the Secretary of State.

NOTE.—Stats. 1861, p. 622, Sec. 40.

State lands
granted for
use of cor-
porations.

474. There is granted to every railroad corporation the right of way for the location, construction, and maintenance of their necessary works, and for every necessary adjunct thereto, over any swamp, overflowed, or other public lands of the State not otherwise disposed of or in use, not in any case exceeding in length or width that which is necessary for the construction of such works and adjuncts, or for the protection thereof, not in any case to exceed two hundred feet in width.

Grant not
to embrace
town lots.

475. The grants mentioned in the preceding section do not apply to public lands of the State within the corporate limits of towns and cities, or within three miles thereof.

Wood,
stone, and
earth may
be taken
from State
lands.

476. The right to take from any of the lands belonging to the State, adjacent to the works of the corporation, all materials, such as wood, stone, and earth, naturally appurtenant thereto, which may be necessary and convenient for the original construction of its works and adjuncts, is granted to such corporations.

Lands to
revert to
State,
when.

477. If any corporation receiving State lands or appurtenances thereunder is dissolved, ceases to exist, is discontinued, or the route or line of its works is so changed as not to cover or cross the lands selected, or the use of the lands selected is abandoned, such selected lands revert, and the title thereto is reinvested in the State or its grantees, free from all such uses.

478. When any selection of the right of way, or land for an adjunct to the works of a railroad corporation, is made by any corporation, the Secretary thereof must transmit to the Surveyor General, Controller of State, and Recorder of the county in which the selected lands are situate, a plat of the lands so selected, giving the extent thereof and uses for which the same is claimed or desired, duly verified to be correct; and, if approved, the Surveyor General must so indorse the plat, and issue to the corporation a permit to use the same, unless, on petition properly presented to the Court, a review is had and such use prohibited.

Selections made, how proved and certified to.

NOTE.—The five preceding sections are drawn from Stats. 1861, pp. 617, 618, Secs. 20, 21, 22.

CHAPTER III.

BUSINESS, HOW CONDUCTED.

SECTION 479. Checks to be affixed to all baggage. Damages.

480. Annual report to be verified. Form of report.

481. Duties of corporation.

482. Corporation to pay damages for refusal.

483. Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.

484. Corporations to post printed regulations, and not responsible for damages in violation of rules.

485. To pay damages. Not liable in certain cases. Corporation may recover damages, when.

486. Regulations of trains. Penalty.

487. Passenger refusing to pay fare.

488. Officers to wear badge.

489. Rates of charges.

490. Passenger tickets, how issued, and to be good for six months.

491. Character of iron to be used.

479. A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employé of such railroad corporation, and a duplicate thereof given to the passenger or person

Checks to be affixed to all baggage.

Damages. delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars, to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare, the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employé of the railroad corporation, he may recover the value thereof from the corporation.

NOTE.—Stats. 1861, p. 623, Sec. 42. The possession of the check is evidence against the company of the receipt of the baggage. It stands in the place of a bill of lading.—*Dill vs. Railway Co.*, 7 Rich., p. 158; *Davis vs. Michigan, etc., R. R. Co.*, 22 Ill., p. 278. If the company gives public notice that it will not be liable for baggage of passengers unless checked, such notice will not have the effect to excuse the company where the passenger delivered his baggage to a proper agent, but was refused a check.—*Freeman vs. Newton*, 3 E. D. Smith, p. 246. The statements of the conductor, baggagemaster, or stationmaster, in reply to inquiries made by the owner the next morning after the loss, are evidence against the company.—*Morse vs. Connecticut River Railway*, 6 Gray, p. 450. Proof that the baggage could not be found raises a presumption of negligence on the part of the carrier.—*Van Horn vs. Kermit*, 4 E. D. Smith, p. 453; *Garvey vs. C. and A. Railway*, p. 280. Says Redfield, in his work on Railways, Vol. II, p. 38, where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of baggage.—*Hart vs. Rensselaer and Sar. Railroad*, 4 Selden, p. 37. In *Cary vs. Cleveland and Toledo Railroads*, 29 Barb., p. 35, it was held that the first is liable for the entire route. And in the English case of *Mytten vs. Midland Railroad Co.*, 4 H. & N., p. 615, that the first company was the only one liable to be sued by the passenger, even when the loss occurred upon the line of one of the other companies.

480. Every railroad corporation must make an an-

nual report to the Secretary of State, or other officer designated by law, of its operations for each year, ending on the thirty-first day of December, verified by the oaths of the President or Acting Superintendent of operations, the Secretary and Treasurer of such corporation, and file it in the office of the Secretary of State, or such other designated officer, by the twentieth day of February, which must state:

Annual
report to be
verified.

1. The capital stock, and the amount thereof actually paid in;
2. The amount expended for the purchase of lands for the construction of the road, for buildings, and for engines and cars, respectively;
3. The amount and nature of its indebtedness, and the amount due the corporation;
4. The amount received from the transportation of passengers, property, mails, and express matter, and from other sources;
5. The amount of freight, specifying the quantity in tons;
6. The amount paid for repairs of engines, cars, buildings, and other expenses, in gross, showing the current expenses of running such road;
7. The number and amount of dividends, and when paid;
8. The number of engine houses and shops, of engines and cars, and their character.

Form of
report.

481. Every such corporation must start and run their cars, for the transportation of persons and property, at such regular times as they shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or is offered for transportation, at the place of starting, at the junction of other railroads, and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport,

Duties of
corporation

Same. and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor.

NOTE.—Railroad companies are common carriers. *Chicago and Aurora R. R. Co. vs. Thompson*, 19 Ill., p. 578; *Heineman vs. Grand Trunk R. R. Co.*, 31 How. Pr., p. 430; *Porter vs. Chicago, etc., R. R. Co.*, 20 Ill., p. 407; 2 *Redfield on Railways*, p. 9. They are bound to carry for all persons who offer, unless they have a reasonable excuse for a refusal so to do.—*Jencks vs. Coleman*, 2 Sumner, p. 221. They may make reasonable regulations as to the mode of performance of their duty as carriers.—*Johnson vs. Concord R. R.*, 46 N. H., p. 213. The validity of such regulations depend upon their reasonableness, which is a question for the jury.—*Morris and Essex R. R. Co. vs. Ayres*, 5 Dutch, p. 393; *State vs. Overton*, 4 Zab., p. 435.

REASONABLE REGULATIONS.—Persons may be excluded from depots unless they are holders of tickets. *Harris vs. Stevens*, 31 Vt., p. 79. Passengers who do not obtain tickets before starting may (if the company has afforded reasonable facilities for procuring tickets) be required to pay a higher rate on the train.—*Porter vs. N. Y. Central R. R. Co.*, 34 Barb., p. 353; *State vs. Goold*, 53 Me., p. 279; *St. Louis, etc., R. R. Co. vs. Dalby*, 19 Ill., p. 353. Passengers by freight trains must purchase tickets before entering the cars, or may be ejected.—*Cleveland, etc., R. R. Co. vs. Bartram*, 11 Ohio St., p. 457. Passengers must exhibit tickets when requested by the person in charge of the train.—*Hibbard vs. N. Y. and Erie R. R. Co.*, 15 N. Y., p. 455. And must surrender tickets during the trip.—*Northern R. R. Co. vs. Page*, 22 Barb., p. 130. Passengers stopping over must have their tickets indorsed.—*Beebe vs. Ayres*, 28 Barb., p. 275.

Corporation to pay damages for refusal.

482. In case of refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same, at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit.

483. Every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and

accommodations for all passengers to whom tickets are sold for any one trip, and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel, or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars.

Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.

484. Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section.

Corporations to post printed regulations, and not responsible for damages in violation of rules.

NOTE.—The five preceding sections were drawn from Stats. 1861, pp. 624, 625, Secs. 44, 45, 46, 48.

485. Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right of

To pay damages.

Not liable in certain cases.

Corporation may recover damages, when.

way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employés.

NOTE.—Stats. 1861, p. 623, Sec. 40.

Regulations of trains.

486. A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the District Attorney of the proper county, for the use of the State. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with.

Penalty.

NOTE.—Stats. 1861, p. 623, Sec. 41.

Passenger refusing to pay fare.

487. If any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, the conductor and employés of the corporation may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, on stopping the train.

NOTE.—The conductor may, without the use of unnecessary force, remove from the cars a passenger who

refuses to pay his fare, or to comply with other reasonable regulations.—*State vs. Overton*, 4 Zab., p. 435. *Havens vs. Hartford and N. H. R. R. Co.*, 28 Conn., p. 69; *State vs. Chovin*, 7 Clarke, p. 204; *Hilliard vs. Goold*, 34 N. H., p. 230. The company must not eject a passenger at any other than one of the places mentioned in the section.—*Stephen vs. Smith*, 29 Vt., p. 160.

488. Every conductor, baggage master, engineer, brakeman, or other employé of any railroad corporation, employed on a passenger train or at stations for passengers, must wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge, indicating his office or station, and the initial letters of the name of the corporation by which he is employed. No collector or conductor, without such badge, is authorized to demand or to receive from any passenger any fare, toll, or ticket, or exercise any of the powers of his office or station; and no other officer or employé, without such badge, has any authority to meddle or interfere with any passenger or property.

Officers to wear badge

489. All railroad corporations must fix and publish their rates of charges for freightage and fares from one depot to another, on their various lines of road in this State, graduated as follows :

Rates of charges.

1. One rate of charges per mile for a distance of one hundred miles or over;
2. One rate for a distance of seventy-five and less than one hundred miles, charging not exceeding ten per cent per mile more than the first rate;
3. One rate for a distance of fifty and less than seventy-five miles, charging not exceeding fifteen per cent per mile more than the first rate;
4. One rate for a distance of twenty-five and less than fifty miles, charging not exceeding twenty per cent per mile more than the first rate;
5. One rate for a distance not exceeding twenty-five

Same. miles, charging not exceeding twenty-five per cent per mile more than the first rate.

But in no case, nor in any class of charges hereinbefore named, shall any railroad corporation charge or receive more than ten cents per mile for each passenger, nor fifteen cents per mile for each ton of freight transported on its road. For every transgression of these limitations the corporation is liable, to the party suffering thereby, treble the entire amount of fare or freightage so charged to such party. In no case is the corporation required to receive less than twenty-five cents for any one lot of freight for any distance.

NOTE.—The three preceding sections are founded on Stats. 1861, p. 625, Secs. 49, 50, 51. The provision fixing grades of charges is in accordance with the statutes of the States of Maine, Missouri, Kansas, and others, and frequent suggestions in this State. In Kansas and Missouri, six cents per mile is the maximum charge for passenger fare, and freightage is graded something like the provisions of this section.

Passenger
tickets,
how issued,
and to be
good for six
months.

490. Every railroad corporation must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars.

Am 491. All railroads, other than street railroads and

those used exclusively for carrying freight or for mining purposes, built by corporations organized under this Chapter, ~~must be~~ ^{shall be} constructed of the best quality of iron rail, known as T rail or H rail, or other pattern of equal utility.

Character
of iron to
be used.

NOTE.—Founded on Stats. 1861, p. 626, Sec. 57; 1862, p. 498.

TITLE IV.

STREET RAILROAD CORPORATIONS.

SECTION 497. Authority to lay street railroad track, how obtained.

498. Restrictions and limitations to the grant of the right of way.

499. Two corporations may use the same track.

500. Crossing tracks. Obstructions.

501. Rates of fare, speed, etc.

502. Time allowed for completion of work of laying down track.

503. May make further regulations and rules.

504. Penalty for overcharging.

505. To provide and furnish passenger tickets. Penalty.

506. Trial, proof, and limitation.

507. City or town to reserve certain rights.

508. License to be paid to city or town.

509. Track for grading purposes.

510. What provisions of Title III are applicable to street railroads.

511. Title applicable to natural persons alike with corporations.

497. Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained, for a term of years not exceeding fifty, from the Trustees, Council, or other body to whom is intrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise

Authority
to lay
street
railroad
track, how
obtained.

than by horses or mules, unless for special reasons, as hereinafter provided.

Restrictions and limitations to the grant of the right of way.

Am 498. The city or town authorities, in granting the right of way to street railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with the following conditions:

1. To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be as nearly as possible in the middle thereof;

2. To plank, pave, or macadamize the entire length of the street used by their track, between the rails and for two feet on each side thereof, and to keep the same constantly in repair flush with the street, and with good crossings;

3. That the tracks must not be more than five feet wide within the rails, and a space between the track sufficient to allow the cars to pass each other freely.

Two corporations may use the same track.

499. Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.

NOTE.—The three preceding sections are taken from Stats. 1870, p. 481, Secs. 1-10.

Crossing tracks.

500. Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in Chapter II, Title III, of this Part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days.

Obstructions.

501. The rates of fare on the cars must not exceed ten cents for one fare, for any distance under three

miles. The cars must be of the most approved construction for comfort and convenience of passengers, and provided with brakes to stop the same, when required. The rate of speed must not be greater than eight miles per hour. A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense.

Rates of fare, speed, etc.

502. Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same must be completed within three years thereafter. A failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation, with the consent of the authorities granting the right of way—such abandonment and consent to be in writing.

Time allowed for completion of work of laying down track.

NOTE.—The three preceding sections are founded on Stats. 1863, p. 297, Secs. 1, 2, 3, 4, 5. This section is also based on Stats. 1870, p. 482, Secs. 1-6.

503. Cities and towns in or through which street railroads run may make such further regulations for the government of such street railroads as may be necessary to a full enjoyment of the franchise and the enforcement of the conditions provided herein.

May make further regulations and rules.

NOTE.—Stats. 1870, p. 483, Sec. 10.

504. Any corporation, or agent or employé thereof, demanding or charging a greater sum of money for fare on the cars of such street railroad than that fixed, as provided in this Title, forfeits to the person from whom such sum is received, or who is thus overcharged, the sum of two hundred dollars, to be recovered in a civil action, in any Justice's Court having jurisdiction thereof, against the corporation.

Penalty for overcharging.

NOTE.—Stats. 1863, p. 297, Sec. 1.

Am 505. Every street railroad corporation must pro-

To provide
and furnish
passenger
tickets.

vide and, on request, furnish to all persons desiring a passage on their cars any required quantity of passenger tickets or checks, each to be good for one ride.

Penalty.

Any corporation failing so to provide and furnish tickets or checks to any person desiring to purchase the same, at not exceeding the rate hereinbefore fixed, must pay to such person the sum of two hundred dollars, to be recovered as provided in the preceding section.

NOTE.—Stats. 1863, p. 297, Sec. 1.

Trial,
proof, and
limitation.

Am 506. Upon the trial of any action for the forfeiture named in the two preceding sections, proof that the person demanding or receiving such sum of money as fare, or for the sale of such ticket or check was, at the time of making such demand or receiving such moneys, engaged on or at any car, omnibus, or vehicle of any railroad belonging to such corporation, is primary evidence that such person so demanding or receiving such moneys was the agent, servant, or employé of the corporation so owning, using, or employing such railroad.

NOTE.—Stats. 1863, p. 297, Secs. 3, 5.

City or
town to
reserve
certain
rights.

Am 507. Every city, town, or city and county, granting the right to construct street railroads within its limits, must reserve the right to grade, sewer, pave, macadamize or otherwise improve, alter, or repair the streets or highways permitted to be used by the corporation, the work to be so done by the city or town as to obstruct the railroad as little as possible, and when such works make the same necessary, the corporation must shift its rails so as to avoid the obstructions made thereby.

NOTE.—Stats. 1870, p. 483, Sec. 9.

License to
be paid to
city or town

508. Each street railroad corporation must pay to the authorities of the city, town, county, or city and county, as a license upon each car, such sum as the authorities may fix, not exceeding fifty dollars per annum

in the City of San Francisco, nor more than twenty-five dollars per annum in other cities or towns. Where any street railroad connects or runs through two or more cities or towns, a proportionate or equal share of such license tax must be paid to each of the cities or towns; and no such license tax is due the county authorities where the same is paid to any city or town authority.

NOTE.—Stats. 1870, p. 483, Sec. 10.

509. The right to lay down a track for grading purposes, and maintain the same for a period not to exceed three years, may be granted by the corporate authorities of any city or town, or city and county, or Supervisors of any city or county, but no such track must remain more than three years upon any one street; and it must be laid level with the street, and must be operated under such restrictions as not to interfere with the use of the street by the public. The corporate authorities of any city or town, or city and county, may grant the right to use steam or any other motive power in propelling the cars used on such grading track, when public convenience or utility demands it, but the reasons therefor must be set forth in the ordinance, and the right to rescind the ordinance at any time reserved.

Track for
grading
purposes.

NOTE.—Stats. 1870, p. 483, Sec. 11.

510. All the provisions of Title III of this Part are applicable to street railroads, unless where street railroads are therein specially excepted, or the provisions are palpably inapplicable.

What
provisions
of Title III
are
applicable
to street
railroads.

511. When a street railroad is constructed, owned, or operated by any natural person, this Title is applicable to such person in like manner as it is applicable to corporations.

Title
applicable
to natural
persons
alike with
corpora-
tions.

TITLE V.

WAGON ROAD CORPORATIONS.

SECTION 512. Three Commissioners to act with Surveyor.

513. Survey and map to be filed and approved by Supervisors.

514. Tolls, etc., to be collected. Penalty for taking unlawful tolls.

515. No tolls to be charged on highways or public roads.

516. Rates of toll to be posted at gate.

517. Toll gatherer may detain persons until they pay toll.

518. Toll gatherer not to detain any person unnecessarily.

519. Persons avoiding tolls to pay five dollars.

520. Penalties for trespasses on property of corporation.

521. When capital invested is repaid, tolls to be reduced, etc.

522. May mortgage and hypothecate corporate property.

523. This Title applies to natural persons as well as corporations.

Three
Commis-
sioners to
act with
Surveyor.

Am 512. Three Commissioners must act in conjunction with the Surveyor of the corporation, two to be appointed by the Board of Supervisors of the county through which the road is to run and one by the corporation, who must lay out the proposed road and report their proceedings, together with a map of the road, to the Supervisors who appointed them, as provided in the succeeding section.

NOTE.—Stats. 1853, p. 114, Sec. 2.

Survey and
map to be
filed and
approved
by Super-
visors.

513. When the route is surveyed, a map thereof must be submitted to and filed with the Board of Supervisors of each county through or into which the road runs, giving its general course and the principal points to or by which it runs, and its width, which must in no case exceed one hundred feet, and the Supervisors must either approve or reject the survey. If approved, it must be entered of record on the journal of the Board, and such approval authorizes the use of all public lands and highways over which the survey runs; but the Board of Supervisors must require

the corporation, at its own expense, and the corporation must so change and open the highway so taken and used as to make the same as good as they were before the appropriation thereof; and must so construct all crossings of public highways over and by its road, and its toll gates, as not to hinder or obstruct the use of the same.

NOTE.—Stats. 1854, p. 74, Sec. 1.

514. All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may take such tolls only on their road, ferries, or bridges as are fixed by the Board of Supervisors of the proper county through which the road passes or in which the ferry or bridge is situate, except that in the Counties of Trinity, Shasta, Klamath, Butte, Siskiyou, Del Norte, Plumas, Humboldt, and Sierra the Directors may fix their own tolls; but in no case must the tolls be more than sufficient to pay fifteen per cent nor less than ten per cent per annum on the cost of construction, after paying for repairs and other expenses for attending to the road, bridges, or ferries. If tolls, other than as herein provided, are charged or demanded, the corporation forfeits its franchise, and must pay, to the party so charged, one hundred dollars as liquidated damages.

Tolls, etc.,
to be
collected.

Penalty for
taking
unlawful
tolls.

NOTE.—Stats. 1857, p. 280, Sec. 1.

515. When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a toll gate on or take tolls for the use of such highway or public road by teamsters, travelers, drovers, or any one transporting property over the same.

No tolls to
be charged
on
highways
or public
roads.

NOTE.—Stats. 1853, p. 114, Sec. 3.

516. The corporation must affix and keep up, at or

Rates of
toll to be
posted at
gate.

over each gate, or in some conspicuous place, so as to be conveniently read, a printed list of the rates of toll levied and demanded.

NOTE.—Stats. 1853, p. 176, Sec. 30.

Toll
gatherer
may detain
persons
until they
pay toll.

517. Each toll gatherer may prevent from passing through his gate persons leading or driving animals or vehicles subject to toll, until they shall have paid, respectively, the tolls authorized to be collected.

NOTE.—Stats. 1853, p. 176, Sec. 29.

Toll
gatherer
not to
detain any
person un-
necessarily.

518. Every toll gatherer who, at any gate, unreasonably hinders or delays any traveler or passenger liable to the payment of toll, or demands or receives from any person more than he is authorized to collect, for each offense forfeits the sum of twenty-five dollars to the person aggrieved.

NOTE.—Stats. 1853, p. 176, Sec. 31.

Persons
avoiding
tolls to pay
five dollars.

519. Every person who, to avoid the payment of the legal toll, with his team, vehicle, or horse, turns out of a wagon, turnpike, or plank road, or passes any gate thereon on ground adjacent thereto, and again enters upon such road, for each offense forfeits the sum of five dollars to the corporation injured.

NOTE.—Stats. 1853, p. 176, Sec. 33.

Penalties
for
trespasses
on property
of corpora-
tion.

520. Every person who:

1. Willfully breaks, cuts down, defaces, or injures any mile stone or post on any wagon, turnpike, or plank road; or,
2. Willfully breaks or throws down any gate on such road; or,
3. Digs up or injures any part of such road or anything thereunto belonging; or,
4. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

For each offense forfeits to the corporation injured

the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act.

NOTE.—Stats. 1853, p. 176, Sec. 32.

Am 521. The entire revenue derived from the road shall be appropriated; first, to repayment to the corporation the costs of its construction, with fifteen per cent per annum interest thereon, together with the incidental expenses incurred in collecting tolls and keeping the road in repair. When the repayment is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay incidental expenses and to keep the road in good repair.

When capital invested is repaid, tolls to be reduced, etc.

NOTE.—Stats. 1853, p. 114, Sec. 4.

522. The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair their road, but no mortgage or hypothecation is valid or binding unless at least twenty-five per cent of the capital stock subscribed has been paid in and invested in the construction of the road and appurtenances, and then only after an affirmative vote of two thirds of the capital stock subscribed.

May mortgage and hypothecate corporate property.

NOTE.—Stats. 1853, p. 173, Sec. 19.

523. When a wagon, turnpike, or plank road is constructed, owned, or operated by any natural person this Title is applicable to such person in like manner as it is applicable to corporations.

This Title applies to natural persons as well as corporations.

TITLE VI.

BRIDGE, FERRY, WHARF, CHUTE, AND PIER CORPORATIONS.

SECTION 528. Corporation to obtain license from Supervisors.

529. In what contingencies corporate existence ceases.

SECTION 530. President and Secretary to make annual report, and what to contain. Damages for failing to report.

531. This Title to apply to natural persons alike with corporations.

Corporation to obtain license from Supervisors.

528. No corporation must construct or take tolls on a bridge, ferry, wharf, chute, or pier until authority is granted therefor by the Supervisors.

NOTE.—Stats. 1853, p. 120, Sec. 1; 1870, p. 526, Sec. 1.

In what contingencies corporate existence ceases.

529. Every such corporation ceases to be a body corporate:

1. If, within six months from filing its articles of incorporation, it has not obtained such authority from the Board of Supervisors; and if, within one year thereafter, it has not commenced the construction of the bridge, wharf, chute, or pier, and actually expended thereon at least ten per cent of the capital stock of the corporation;

2. If, within three years from filing the articles of incorporation, the bridge, wharf, chute, or pier is not completed;

3. If, when the bridge, wharf, chute, or pier of the corporation is destroyed, it is not reconstructed and ready for use within three years thereafter;

4. If the ferry of any such corporation is not in running order within three months after authority is obtained to establish it, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law.

NOTE.—Stats. 1850, p. 347, Sec. 169.

President and Secretary to make annual report, and what to contain.

530. The President and Secretary of every bridge, ferry, wharf, chute, or pier corporation, must annually, under oath, report to the Board of Supervisors of the county in which the articles of incorporation are filed:

1. The cost of constructing and providing all necessary appendages and appurtenances for their bridge, ferry, wharf, chute, or pier;

2. The amount of all moneys expended thereon, since Same.
its construction, for repairs and incidental expenses;

3. The amount of their capital stock, how much paid
in, and how much actually expended thereof;

4. The amount received during the year for tolls and
from all other sources, stating each separately;

5. The amount of dividends made, and the indebt-
edness of the corporation, specifying for what it was
incurred;

6. Such other facts and particulars respecting the
business of the corporation as the Board of Supervi-
sors may require.

This report the President and Secretary must cause
to be published for four weeks in a daily newspaper
published nearest the bridge, ferry, wharf, pier, or
chute, if required by order of the Board of Supervi-
sors. A failure to make such report subjects the cor-
poration to a penalty of two hundred dollars; and for
every week permitted to elapse after such failure, an
additional penalty of fifty dollars; payable in each case
to the county from which the authority of the corpora-
tion was derived. All such cases must be reported by
the Board of Supervisors to the District Attorney, who
must commence an action therefor.

Damages
for failing
to report.

NOTE.—Stats. 1850, p. 347, Secs. 170–173.

531. When a bridge, ferry, wharf, chute, or pier is
constructed, operated, or owned by a natural person,
this Title is applicable to such person in like manner
as it is applicable to corporations.

This Title
to apply
to natural
persons
alike with
corpora-
tions.

TITLE VII.

TELEGRAPH CORPORATIONS.

SECTION 536. May use right of way along waters, roads, and high-
ways.

SECTION 537. Persons liable for damages for injuring telegraph property.

538. Party guilty of willful and malicious injury, liable to one hundred times actual damages.

539. Conditions on which damage to sub-aqueous cable may be recovered.

540. May dispose of certain rights.

541. Rates of charges to be fixed, and how published.

May use
right of
way along
waters,
roads, and
highways.

536. Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters.

NOTE.—Stats. 1857, p. 171, Sec. 1.

Persons
liable for
damages
for injuring
telegraph
property.

537. Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph corporation, is liable to the corporation for all damages sustained thereby. Any vessel which, by dragging its anchor or otherwise, breaks, injures, or destroys the sub-aqueous cable of a telegraph corporation, subjects its owner to the damages hereinbefore specified.

NOTE.—Stats. 1850, p. 347, Sec. 152; 1857, p. 171, Sec. 2; 1862, p. 290, Sec. 8.

Party
guilty of
willful and
malicious
injury,
liable to
one
hundred
times
actual
damages.

538. Any person who willfully and maliciously does any injury to any telegraph property mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any Court of competent jurisdiction.

NOTE.—Stats. 1862, p. 290, Sec. 8.

Conditions
on which
damage to
sub-
aqueous
cable may
be
recovered.

539. No telegraph corporation can recover damages for the breaking or injury of any sub-aqueous telegraph cable, unless such corporation has previously erected, on either bank of the waters under which the cable is

placed, a monument, indicating the place where the cable lies, and publishes for one month in some newspaper most likely to give notice to navigators, a notice giving a description and the purpose of the monuments, and the general course, landings, and termini of the cable.

NOTE.—Stats. 1857, p. 171, Sec. 3.

540. Any telegraph corporation may at any time, with the consent of the persons holding two thirds of the issued stock of the corporation, sell, lease, assign, transfer, or convey any rights, privileges, franchises, or property of the corporation, except its corporate franchise.

May dispose of certain rights.

NOTE.—Stats. 1861, p. 84, Sec. 6.

Ref 541. Every telegraph corporation must fix uniform rates of charges for transmitting messages proportionate to the number of miles the same are sent, which must be uniform throughout the State, and publish them by posting such rates at each of their offices in use.

Rates of charges to be fixed, and how published.

TITLE VIII.

WATER AND CANAL CORPORATIONS.

SECTION 548. Corporation may obtain contract to supply city or town.

549. Duties of corporation. Rates fixed by Commissioners.

550. Right to use streets, ways, alleys, and roads.

551. To build and keep bridges in repair.

548. No corporation formed to supply any city, city and county, or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city, city and county, or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city,

Corporation may obtain contract to supply city or town.

city and county, or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.

NOTE.—Stats. 1852, p. 171, Sec. 3.

am
Duties of
corporation.

Rates fixed
by Commissioners.

549. All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water, to the extent of their means, in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by a Board of Commissioners, to be selected as follows: Two by the city and county, or city or town authorities, and two by the water company; and in case they cannot agree to the valuation they must choose a fifth member of the Board; if the four Commissioners cannot agree upon a fifth, then the County Judge of the county must appoint such fifth person. The decision of the majority of the Board determines the rates to be charged for water for one year, and until new rates are established. The Board of Supervisors, or the proper city or town authorities, may prescribe other proper rules relating to the delivery of water, not inconsistent with the laws of this State.

NOTE.—Stats. 1858, p. 219, Sec. 4.

Right to
use streets
ways,
alleys,
and roads.

550. Any corporation created under the provisions of this Part, for the purposes named in this Title, subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways, and alleys in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into

any such town, city, or city and county, or through or into any part thereof.

NOTE.—Stats. 1868, p. 220, Sec. 5.

551. Every water or canal corporation must construct and keep in good repair, at all times, for public use, across their canal, flume, or water pipe, all of the bridges that the Board of Supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways and necessary for public uses in connection with such highways; and all waterworks must be so laid and constructed as not to obstruct public highways.

To build
and keep
bridges in
repair.

NOTE.—Stats. 1862, p. 541, Sec. 4.

TITLE IX.

HOMESTEAD CORPORATIONS.

SECTION 557. Time of corporate existence.

558. By-laws must specify time for and amount of payment of installments, and penalty for failure to pay. By-laws to be furnished to any member on demand.

559. Advertisement and sale of delinquent and forfeited shares.

560. May borrow and loan funds—how, and for what time.

561. Minor children, wards, and married women may own stock.

562. Forfeiture for speculating in or owning lands exceeding two hundred thousand dollars.

563. When corporation is terminated, and how.

564. Payment of premiums.

565. Annual report to be published.

566. Publication in certain cases.

557. Corporations organized for the purpose of acquiring lands in large tracts, paying off encumbrances thereon, improving and subdividing them into homestead lots or parcels, and distributing them among the

Time of
corporate
existence.

shareholders, and for the accumulation of a fund for such purposes, are known as homestead corporations, and must not have a corporate existence for a longer period than ten years.

NOTE.—Stats. 1861, p. 567, Secs. 1, 3; 1867-8, p. 539, Sec. 1.

By-laws must specify time for and amount of payment of installments, etc. By-laws to be furnished, etc.

558. Such corporations must specify in their by-laws the times when the installments of the capital stock are payable, the amount thereof, and the fines, penalties, or forfeitures incurred in case of default. A printed copy of the articles of incorporation and by-laws must be furnished to any shareholder on demand.

Advertisement and sale of delinquent and forfeited shares.

559. Whenever any shares of stock are declared forfeited by resolution of the Board of Directors, the Directors may advertise the same for sale, giving the name of the subscriber and the number of shares, by notice of not less than three weeks, published at least once a week in a newspaper of general circulation in the city, town, or county where the principal place of business of such corporation is located. Such sale must be made at auction, under the direction of the Secretary of the company. The corporation may be a bidder, and the shares must be disposed of to the highest bidder for cash. No defect, informality, or irregularity in the proceedings respecting the sale invalidates it, if notice is given as herein provided. After the sale is made the Secretary must, on receipt of the purchase money, transfer to the purchaser the shares sold, and after deducting from the proceeds of such sale all installments then due, and all expenses and charges of sale, must hold the residue subject to the order of the delinquent subscriber.

NOTE.—Stats. 1863-4, p. 492; 1867-8, p. 540, Sec. 1.

560. Homestead corporations may borrow money for the purposes of the corporation, not exceeding at any one time one fourth of the aggregate amount of

the shares or parts of shares actually paid in, and the income thereof; no greater rate of interest must be paid therefor than twelve per cent per annum. For the purpose of completing the purchase of lands intended to be divided and distributed, they may borrow on the security of their shares on the land thus purchased, or that owned by the corporation at the time of procuring the loan, any sum of money which, together with the interest contracted to become due thereon, will not exceed ninety per cent of the unpaid amount subscribed by the shareholders; but no loan must be made to the corporation for a term extending beyond that of its existence.

May
borrow and
loan funds.
How, and
for what
time.

NOTE.—Stats. 1870, p. 474, Sec. 1; 1861, p. 567, Sec. 5.

561. Such shares of stock in homestead corporations as may be acquired by children, the cost of which, and the deposits and assessments on which are paid from the personal earnings of the children, or with gifts from persons other than their male parents, may be taken and held for them by their parents or guardians. Married women may hold such shares as they acquire with their personal earnings, or those of their children, voluntarily bestowed therefor, or from property bequeathed or given to them by persons other than their husbands.

Minor
children,
wards, and
married
women
may own
stock.

NOTE.—Stats. 1861, p. 567, Sec. 6.

562. Homestead corporations must not purchase and sell, or otherwise acquire and dispose of real property, or any interest therein, or any personal property, for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property, or any interest therein, which in the aggregate exceeds in cash value the sum of two hundred thousand dollars. For any violation of the provisions of this section, corporations forfeit their corporate rights and powers. On

Forfeiture
for specu-
lating in or
owning
lands
exceeding
two
hundred
thousand
dollars.

the application of any citizen to a Court of competent jurisdiction such forfeiture may be adjudged, and the judgment carries with it costs of the proceedings.

When corporation is terminated, and how.

563. Except for the purpose of winding up and settling its affairs, every homestead corporation must terminate at the expiration of the time fixed for its existence in the articles of incorporation, or when dissolved as provided in this Part. No dividend of funds must be made on termination of its corporate existence, until its debts and liabilities are paid; and upon the final settlement of the affairs of the corporation, or upon the termination of its corporate existence, the Directors, in such manner as they may determine, must divide its property among its shareholders in proportion to their respective interests, or, upon the application of a majority in interest of the stockholders, must sell and dispose of any or all of the real estate of the corporation upon such terms as may be most conducive to the interests of all the stockholders, and must convey the same to the purchaser, and distribute the proceeds among the shareholders, or may at any time, when best for the interests of all the shareholders, cause the lands of the corporation to be subdivided into lots and distributed, by sale for premiums, at auction or otherwise, among the shareholders.

NOTE.—Stats. 1861, p. 567, Sec. 7; 1870, p. 474, Sec. 1.

Payment of premiums.

564. Such premiums on lots may be made payable at the time they are bid off, and, if not so paid on any lot of land, the Directors may immediately offer the same for sale again. If made payable at a future day, and any shareholder fails to pay his bid on the day the same is made due and payable, the Directors may advertise and sell the shares of stock representing the lots of land on which the premiums remain unpaid, in the manner provided in the by-laws for the sale of

shares on account of delinquent installments and premiums.

NOTE.—Stats. 1870, p. 474, Sec. 1.

565. The actual financial condition of all homestead corporations must, by the Directors thereof, be published annually in the [a] newspaper published at the principal place of business of the corporation, for four weeks, if published in a weekly, and two weeks, if published in a daily. The statement must be made up to the end of each year, and must be verified by the oath of the President and Secretary, showing the items of property and liabilities.

Annual
report to be
published.

NOTE.—Stats. 1861, p. 567, Sec. 8.

566. In any case in which a publication is required, and no newspaper is published at the principal place of business, the publication may be made in a paper published in an adjoining county.

Publica-
tion in
certain
cases.

TITLE X.

SAVINGS AND LOAN CORPORATIONS.

- SECTION 571. May loan money—on what terms, how, and to whom, and how long.
572. Capital stock, and rights and privileges thereof.
573. No dividends, except from surplus profits. To contract no liability, except for deposits.
574. Property which may be owned by corporations, and how disposed of. Restrictions in purchases as provided above.
575. Married women and minors may own stock in their own right.
576. May issue transferable certificates of deposit. Special certificates.
577. To provide Reserve Fund for the payment of losses.
578. Prohibition on Director and officer, and what vacates office.
579. Definition of phrase "create debts."

May loan money. On what terms, how, and to whom, and how long.

571. Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders, and depositors, may loan and invest the funds thereof, receive deposits of money, loan, invest, and collect the same, with interest, and may repay depositors with or without interest. No such corporation must loan money, except on adequate security on real or personal property, and such loan must not be for a longer period than six years.

NOTE.—Stats. 1862, p. 199, Secs. 4, 5; 1864, p. 158, Sec. 2.

Capital stock, and rights and privileges thereof.

572. When savings and loan corporations have a capital stock specified in their articles of incorporation, certificates of the ownership of shares may be issued; and the rights and privileges to be accorded to, and the obligations to be imposed upon, such capital stock, as distinct from those of depositors, must be fixed and defined, either in the articles of incorporation or in the by-laws.

NOTE.—Stats. 1862, p. 203, Sec. 17.

No dividend, except from surplus profits.

573. The Directors of savings and loan corporations may, at such times and in such manner as the by-laws prescribe, declare and pay dividends of so much of the profits of the corporation, and of the interest arising from the capital stock and deposits, as may be appropriated for that purpose under the by-laws or under their agreements with depositors. The Directors must not contract any debt or liability against the corporation for any purpose whatever, except for deposits. The capital stock and the assets of the corporation are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders.

To contract no liability, except for deposits.

NOTE.—Stats. 1870, p. 130, Sec. 1; 1862, p. 199, Sec. 10; 1862, p. 199, Sec. 22.

Am
574. Savings and loan corporations may purchase, hold, and convey real and personal property, as follows:

Property which may be owned by corporations, and how disposed of.

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars; except, on a vote of two thirds of the stockholders, the corporation may increase the sum to an amount not exceeding two hundred and fifty thousand dollars;

2. Such as may have been mortgaged, pledged, or conveyed to it in trust, for its benefit, in good faith, for money loaned in pursuance of the regular business of the corporation;

3. Such as may have been purchased at sales under pledges, mortgages, or deeds of trust made for its benefit, for money so loaned;

4. No such corporation must purchase, hold, or convey real estate in any other case or for any other purpose; and all real estate described in Subdivision 3 of this section must be sold by the corporation within five years after the title thereto is vested in it by purchase or otherwise;

5. No corporation must purchase, own, or sell personal property, except such as may be requisite for its immediate accommodation, for the convenient transaction of its business, mortgages on real estate, bonds, securities, or evidences of indebtedness, public or private, gold and silver bullion, and United States mint certificates of ascertained value, and evidences of debt issued by the United States;

6. No corporation must purchase, hold, or convey bonds, securities, or evidences of indebtedness, public or private, except bonds of the United States, of the State of California, and of the counties, cities, or cities and counties, or towns of the State of California, unless such corporation has a capital stock or reserved fund,

Restrictions in purchases as provided above.

Amended

or both capital stock and reserved fund, paid in, of not less than three hundred thousand dollars.

NOTE.—Stats. 1862, p. 199, Sec. 13; 1864, p. 158, Sec. 3; 1865-6, p. 626, Sec. 1.

Married women and minors may own stock in their own right.

575. Married women and minors may, in their own right, make and draw deposits and draw dividends, and give valid receipts therefor.

NOTE.—Stats. 1862, p. 199, Secs. 14, 15; 1864, p. 158, Sec. 4; 1870, p. 132, Secs. 2, 3.

May issue transferable certificates of deposit.

Special certificates.

576. Savings and loan corporations may issue general certificates of deposit, which are transferable, as in other cases, by indorsement and delivery; may issue, when requested by the depositor, special certificates, acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferred only on the books of the corporation; payment thereafter made by the corporation to the depositor named in such certificate, or to his assignee named upon the books of the corporation, or, in case of death, to the legal representative of such person, of the sum for which such special certificate was issued, discharges the corporation from all further liability on account of the money so paid.

NOTE.—Stats. 1867-8, p. 459, Sec. 1.

To provide Reserve Fund for the payment of losses.

577. Savings and loan corporations may prescribe by their by-laws the time and conditions on which repayment is to be made to depositors; but whenever there is any call by depositors for repayment of a greater amount than the corporation may have disposable for that purpose, the Directors or officers thereof must not make any new loans or investments of the funds of the depositors, or of the earnings thereof, until such excess of call has ceased. The Directors of any such corporation having no capital stock must retain,

on each dividend day, at least five per cent of the net profits of the corporation, to constitute a Reserve Fund, which must be invested in the same manner as other funds of the corporation, and must be used toward paying any losses which the corporation may sustain in pursuing its lawful business. The corporation may provide by its by-laws for the disposal of any excess in the Reserve Fund over one hundred thousand dollars, and the final disposal, upon the dissolution of the corporation, of the Reserve Fund, or of the remainder thereof, after payment of losses. Same.

NOTE.—Stats. 1862, p. 201, Sec. 11; 1870, pp. 523, 822.

578. No Director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, nor must he become an indorser or surety for loans to others, nor in any manner be an obligor for moneys borrowed of or loaned by such corporation. The office of any Director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant. Prohibition on Director and officer, and what vacates office.

579. Receiving deposits, issuing certificates of deposit, checks, and bills of exchange and the like, in the transaction of the business of savings and loan corporations, must not be construed to be the creation of debts within the meaning of the phrase "create debts," in Section 309. Definition of phrase "create debts."

TITLE XI.

MINING CORPORATIONS.

SECTION 584. Removal of the principal office provided for.

585. Directors to file certificates of proceedings in offices of County Clerks and Secretary of State.

586. Transfer agencies.

587. Stock issued at transfer agencies.

Removal
of the
principal
office
provided
for.

584. Every mining corporation may change its principal place of business from one county or city to another, within this State. Before such removal is made the consent in writing of the holders of two thirds of the capital stock must be obtained and filed in the office of the corporation. When such consent is obtained, notice of the intended removal must be published for thirty days in some newspaper published at the principal place of business of the corporation, giving the name of the county or city where it is then situated, and that to which it is intended to remove it.

NOTE.—Stats. 1863-4, p. 76, Sec. 1.

Directors to
file certi-
ficates of
proceed-
ings in
offices of
County
Clerks and
Secretary
of State.

585. When the publication provided for in the preceding section has been completed, the Directors of the corporation must file in the offices of the Clerks of the counties from and to which such change has been made, and in the office of the Secretary of State, certified copies of the written consent of the stockholders to such change, and of the notice of such change, and proof of publication; also, a certificate that the proposed removal has taken place; and thereafter the principal place of business of the corporation is at the place to which it is removed.

NOTE.—Stats. 1863-4, p. 76, Sec. 2.

Transfer
agencies.

586. Any corporation organized in this State for the purpose of mining or carrying on mining operations in or without this State, may establish and maintain agencies in other States of the United States, for

the transfer and issuing of their stock; and a transfer Same. or issue of the same at any such transfer agency, in accordance with the provisions of its by-laws, is valid and binding as fully and effectually for all purposes as if made upon the books of such corporation at its principal office within this State. The agencies must be governed by the by-laws and the Directors of the corporation.

NOTE.—Stats. 1863-4, p. 429, Secs. 1, 3.

587. All stock of any such corporation, issued at a transfer agency, must be signed by the President and Secretary of the corporation, and countersigned at the time of its issue by the agent having charge of the transfer agency. No stock must be issued at a transfer agency unless the certificate of stock, in lieu of which the same is issued, is at the time surrendered for cancellation. Stock issued at transfer agencies.

NOTE.—Stats. 1863-4, p. 429, Sec. 2.

Stats. 1871-2, p. 413:

An Act for the protection of Miners.

[Approved March 16, 1872.]

[Enacting clause.]

SECTION 1. It shall not be lawful for any corporation, association, owner, or owners of any quartz mining claims within the State of California, where such corporation, association, owner, or owners employ twelve men daily, to sink down into such mine or mines any perpendicular shaft or incline beyond a depth from the surface of three hundred feet without providing a second mode of egress from such mine, by shaft or tunnel, to connect with the main shaft at a depth of not less than one hundred feet from the surface.

SEC. 2. It shall be the duty of each corporation, association, owner, or owners of any quartz mine or mines in this State, where it becomes necessary to work such mines beyond the depth of three hundred feet, and where the number of men employed therein daily shall be twelve or more, to proceed to sink another shaft or construct a tunnel so as to connect with the main working shaft of such mine as a mode of escape from underground accident or otherwise. And all corporations, associations, owner, or owners of mines as aforesaid, working at a greater depth than three hundred feet, not

having any other mode of egress than from the main shaft, shall proceed as herein provided.

SEC. 3. When any corporation, association, owner, or owners of any quartz mine in this State shall fail to provide for the proper egress as herein contemplated, and where any accident shall occur, or any miner working therein shall be hurt or injured, and from such injury might have escaped if the second mode of egress had existed, such corporation, association, owner or owners of the mine where the injuries shall have occurred, shall be liable to the person injured in all damages that may accrue by reason thereof; and an action at law in a Court of competent jurisdiction may be maintained against the owner or owners of such mine, which owners shall be jointly or severally liable for such damages. And where death shall ensue from injuries received from any negligence on the part of the owners thereof by reason of their failure to comply with any of the provisions of this Act, the heirs or relatives surviving the deceased may commence an action for the recovery of such damages as provided by an Act entitled an Act requiring compensation for causing death by wrongful act, neglect, or default, approved April twenty-sixth, eighteen hundred and sixty-two.

SEC. 4. This Act shall take effect and be in force six months from and after its passage.

NOTE.—Stats. 1871-2, p. 443:

An Act supplemental to an Act entitled an Act concerning corporations, passed twenty-second April, one thousand eight hundred and fifty.

[Approved March 21, 1872]

[Enacting clause.]

SECTION 1. On petition of the majority of the shareholders of any corporation formed for the purpose of mining to the County Judge of the county where said corporation has its principal place of business, verified by the signers, to the effect that they are severally the holders on the books of the company of the number of shares set opposite their signatures to the foregoing petition, the County Judge shall issue his notice to the shareholders of said company that a meeting of the shareholders will be held, stating the time, not less than five nor more than ten days after the first publication of such notice, and the place of meeting within said county, and the object to be to take into consideration the removal of officers of said company; which

notice, signed by the said County Judge, shall be published daily in one or more daily newspapers published in said county for at least five days before the time for the meeting.

SEC. 2. At the time and place appointed by said notice those claiming to be shareholders who shall assemble shall proceed to organize by the appointment of a Chairman and Secretary, and thereupon those claiming to be shareholders shall present proof thereof, and only those showing a right to vote shall take part in the further proceedings. If it appears that at the time appointed, or within one hour thereafter, shareholders of less than one half the shares are present, no further proceedings shall be had, but the meeting shall be *ipso facto* dissolved; *provided*, however, that by a vote of the holders of two thirds of the capital stock of the corporations aforesaid, the Board of Trustees may be required to furnish to the meeting a written detailed statement and account of the affairs, business, and property of the corporation; but if the holders of more than two thirds of the shares are present they shall proceed to vote, the Secretary calling the roll and the members voting yea or no, as the case may be. The Secretary shall enter the same upon his list, and when he has added up the list and stated the result, he shall sign the same and hand it to the Chairman, who shall also sign the same and declare the result.

SEC. 3. If the result of the vote is that the holders of a majority of all the shares of the company are in favor of the removal of one or more of the officers of the company, the meeting shall then proceed to ballot for officers to supply the vacancies thus created. Tellers shall be appointed by the Chairman, who shall collect the ballots and deliver them to the Secretary, who shall count the same in open session, and having stated the result of the count in writing, shall sign the same and hand it to the Chairman, who shall announce the result to the meeting.

SEC. 4. A report of the proceedings of the meeting shall be made in writing, signed by the Chairman and Secretary and verified by them, and delivered to the County Judge, who shall thereupon issue to each person chosen a certificate of his election, and shall also issue an order requiring that all books, papers, and all property and effects be immediately delivered to the officers elect, and the petition and report, indorsed with the date and fact of the issuance of such certificate and order, shall be delivered to the County Clerk to be by him filed in his office, and thereafter the persons thus

elected officers shall be the duly elected officers and hold office until the next regular annual meeting, unless removed under the provisions hereof.

SEC. 5. For all services in these proceedings the County Clerk shall receive ten dollars on the issuance of the notice and ten dollars on the issuance of the certificates.

SEC. 6. All Acts or parts of Acts conflicting with this Act are hereby repealed.

SEC. 7. This Act shall take effect immediately.

TITLE XII.

RELIGIOUS, SOCIAL, AND BENEVOLENT CORPORATIONS.

SECTION 593. Corporations for purposes other than profit, how formed.

594. Additional facts articles of incorporation to set out.

595. Corporation to hold property, and amount of real estate limited.

596. How much land Masons, Odd Fellows, and Pioneers may hold.

597. Directors to make verified report annually.

598. Corporations may, by order of the District Court, sell or mortgage real estate, when. Petition. Summons or notice. Objections or answer. Trial, order, or decree. Court may direct appraisement of property and disposition of proceeds.

599. What may be provided for in their by-laws, etc.

600. Members admitted after incorporation.

601. No member to transfer membership, etc.

Corporations for purposes other than profit, how formed.

593. Any number of persons associated together for religious, social, benevolent, or other purpose included in the subdivisions of Section 286, where pecuniary profit is not their object, may, in accordance with the rules, regulations, or discipline of such association, elect Directors, the number thereof to be not less than three nor more than eleven, and may incorporate themselves as provided in this Part.

NOTE.—Stats. 1870, p. 46; p. 402, Sec. 1.

594. In addition to the requirements of Section

290, the articles of incorporation of any association mentioned in the preceding section must set forth the holding of the election for Directors, the time and place where the same was held, that a majority of the members of such association were present and voted at such election, and the result thereof; which facts must be verified by the officers conducting the election.

Additional facts articles of incorporation to set out.

NOTE.—Stats. 1850, p. 347, Sec. 176; 1862, p. 125.

595. All such corporations may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto; but no such corporation must own or hold more real estate than may be necessary for the business and objects of the association and providing burial grounds for its deceased members, not to exceed six whole lots in any city or town nor more than twenty acres in the country, the annual increase or income whereof must not exceed fifty thousand dollars.

Corporation to hold property, and amount of real estate limited.

NOTE.—Stats. 1850, p. 347, Sec. 182; 1862, p. 125.

596. In addition to that provided for in the preceding section, Masons, Odd Fellows, and Pioneer incorporated associations may hold such real estate as may be necessary to carry out their charitable purposes, or for the establishment and endowment of institutions of learning connected therewith. In case any such corporation is the owner, by donation or purchase, of more lands than herein or in the preceding section provided for, such surplus must be sold and conveyed by the corporation within five years after its acquisition. Such sale may be made without the order or decree of the District Court, as hereinafter provided.

How much land Masons, Odd Fellows, and Pioneers may hold.

NOTE.—Stats. 1862, p. 125; 1863, pp. 34, 624.

597. The Directors must annually make a full report of all property, real and personal, held in trust for their corporation by them, and of the condition

Directors to make verified report annually.

thereof, to the members of the association for which they are acting.

NOTE.—Stats. 1850, p. 374, Sec. 183.

Corporations may, by order of the District Court, sell or mortgage real estate, when.

Am

598. Corporations organized by members of associations mentioned in Section 593 may mortgage or sell the necessary real estate held by them, on complying with the following provisions:

1. The Directors must, by resolution, declare such disposition of the real estate necessary, or for the best interests of the corporation, in the prosecution of the purposes of the association, setting forth the grounds therefor;

Petition.

2. The Directors must petition the District Court of the county in which the real estate is situated, for the mortgage or sale thereof, setting forth the resolution upon which the petition is based;

Summons or notice.

3. The Judge of the Court, if it appear that it is a case in which such order should be made, must direct publication of summons to all persons interested in the property to appear before the Court and show cause why such order or decree should not be made. The notice must be published in a newspaper published in the city or county where the property is situated, for such time as the Judge may direct; in place of the publication, personal notice may be served on all persons interested in the real estate;

Objections or answer.

4. At any time before the day set for hearing the petition any person interested in the property may present objections or answer to the petition, raising either question of law or fact, and the same must be tried by the Court as other cases are tried;

Trial, order, or decree.

5. If on the hearing at the trial it is found by the Court that the mortgage or sale of the property is unnecessary, or that the best interests of the corporation will not be subserved or advanced thereby, the order and decree must be denied; if it is found necessary, or that the best interests of the corporation will

be subversed or advanced thereby, the petition must be granted;

6. The Court may, if considered necessary, direct an appraisement of the property to be first made, and appoint disinterested appraisers therefor, fix their compensation and the time for them to report; and direct the making and execution of the mortgage or deed and all necessary accompanying notes, bonds, or contracts, and to what purpose the proceeds must be applied by the corporation as best comports with its objects.

Court may direct appraisement of property and disposition of proceeds.

NOTE.—Stats. 1850, p. 347, Sec. 179; 1859, p. 87, Sec. 1.

599. Corporations organized for purposes other than for profit may in their by-laws, ordinances, Constitutions, or articles of incorporation, in addition to the provisions in Title I of this Part, provide for :

What may be provided for in their by-laws, etc.

1. The qualifications of members, mode of election, and terms of admission to membership;

2. The fees of admission and dues to be paid to their treasury by members;

3. The expulsion and suspension of members for misconduct or non-payment of dues; also, for restoration to membership;

4. Contracting, securing, paying, and limiting the amount of their indebtedness;

5. Other regulations, not repugnant to the Constitution or laws of the State, and consonant with the objects of the corporation.

NOTE.—Stats. 1863, p. 624, Secs. 8, 9.

600. Members admitted after incorporation have all the rights and privileges, and are subject to the same responsibilities, as members of the association prior thereto.

Members admitted after incorporation.

NOTE.—Stats. 1863, p. 624, Sec. 7.

No
member to
transfer
member-
ship, etc.

601. No member, or his legal representative, must dispose of or transfer any right or privilege conferred on him by reason of his membership of such corporation, or be deprived thereof, except as herein provided.

TITLE XIII.

CEMETERY CORPORATIONS.

SECTION 608. How much land may be held, and how disposed of.

609. Who are members eligible to vote and hold office.

610. May hold personal property, to what amount. How disposed of.

611. May issue bonds to pay for grounds. Proceeds of sales, how disposed of.

612. May take and hold property or use income thereof, how.

613. Interments in lot, and effect thereof. Transfer of rights only made, how.

614. Lot owners previous to purchase to be members of the corporation.

How much
land may
be held,
and how
disposed of.

608. Corporations organized to establish and maintain cemeteries may take by purchase, donation, or devise, land, not exceeding three hundred and twenty acres in extent, in the county wherein their articles of incorporation are filed, to be held and occupied exclusively as a cemetery for the burial of the dead. The lands must be surveyed and subdivided into lots or plats, avenues, and walks, under order of the Directors, and a map thereof filed in the office of the Recorder of the county wherein the lands are situated. Thereafter, upon such terms and subject to such conditions and restrictions, to be inserted in the conveyances, as the by-laws or Directors may prescribe, the Directors may sell and convey the lots or plats to purchasers.

NOTE.—Stats. 1859, p. 281, Sec. 4.

609. Every person of full age who is proprietor of a lot or plat in the cemetery of the corporation, con-

taining not less than two hundred square feet of land, or, if there be more than one proprietor of any such lot, then such of the proprietors as the majority of joint proprietors designate, may, in person or by proxy, cast one vote at all elections had by the corporation for Directors or any other purpose, and is eligible to any office of the corporation. At each annual meeting or election, the Directors must make a report to the proprietors of all their doings, and of the management and condition of the property and concerns of the corporation.

Who are members eligible to vote and hold office.

NOTE.—Stats 1859, p. 281, Sec. 5.

610. Such corporations may hold personal property to an amount not exceeding five thousand dollars, in addition to the surplus remaining from the sales of lots or plats after the payments required in the succeeding section. Such surplus must be disposed of in the improvement, embellishment, and preservation of the cemetery, and paying incidental expenses of the corporation, and in no other manner.

May hold personal property to what amount.

How disposed of.

NOTE.—Stats. 1859, p. 281, Sec. 4; 1864, p. 12, Sec. 1.

611. Such corporations may issue their bonds, bearing interest not exceeding twelve per cent per annum, for the purchase of lands for their cemeteries, payable out of the proceeds of the cemetery, and not otherwise. Sixty per cent of the proceeds of sales of lots, plats, and graves must be applied at least every three months to the payment of the bonds and interest.

May issue bonds to pay for grounds.

Proceeds of sales, how disposed of.

NOTE.—Stats. 1859, p. 281, Sec. 7; 1864, p. 12, Sec. 1.

612. Cemetery corporations may take and hold any property bequeathed or given them on trust, or the lots, plats, or graves thereon, for the specific purpose of embellishing or improving the grounds, avenues, or superstructures of their cemeteries, to use the income thereof, for the erection, preservation, or repair of monuments therein, or for any other purpose

May take and hold property or use income thereof, how.

or design consistent with the objects of the corporation.

NOTE.—Stats. 1859, p. 281, Sec. 9.

Interments
in lot, and
effect
thereof.

Transfer of
rights only
made, how.

613. Whenever an interment is made in any lot or plat transferred to individual owners by the corporation, the same thereby becomes forever inalienable, and descends in regular line of succession to the heirs at law of the owner. When there are several owners of interests in such lot or plat, one or more may acquire by purchase the interest of others interested in the fee simple title thereof; but no one not an owner acquires interest or right of burial therein by purchase; nor must any one be buried in any such lot or plat, not at the time owning an interest therein, or who is not the relative of such owner or of his wife, except by consent of all jointly interested.

NOTE.—Stats. 1859, p. 281, Sec. 11.

Lot owners
previous to
purchase
to be
members
of the cor-
poration.

614. When grounds purchased or otherwise acquired for cemetery purposes have been previously used as a burial ground, those who are lot owners at the time of the purchase continue to own the same, and are members of the corporation, with all the privileges a purchase of a lot from the corporation confers.

NOTE.—Stats. 1859, p. 281, Sec. 12.

TITLE XIV.

AGRICULTURAL FAIR CORPORATIONS.

SECTION 620. May acquire and hold real estate, how much.

621. Shall not contract debts or liabilities exceeding amount in treasury.

622. Not for profit. May fix fee, etc., for membership.

620. Agricultural Fair corporations may purchase, hold, or lease any quantity of land, not exceeding in the aggregate one hundred and sixty acres, with such

buildings and improvements as may be erected thereon, and may sell, lease, or otherwise dispose of the same, at pleasure. This real estate must be held for the purpose of erecting buildings and other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactures, stock raising, and general domestic industry.

May acquire and hold real estate, how much.

NOTE.—Stats. 1859, p. 104, Sec. 2.

621. Such corporation must not contract any debts or liabilities in excess of the amount of money in the treasury at the time of contract, except for the purchase of real property, for which they may create a debt not exceeding five thousand dollars, secured by mortgage on the property of the corporation. The Directors who vote therefor are personally liable for any debt contracted or incurred in violation of this section.

Shall not contract debts or liabilities exceeding amount in Treasury.

NOTE.—Stats. 1859, p. 104, Sec. 5.

622. Agricultural Fair corporations are not conducted for profit, and have no capital stock or income other than that derived from charges to exhibitors and fees for membership, which charges, together with the term of membership and mode of acquiring the same, must be provided for in their by-laws. Such fees must never be greater than to raise sufficient revenue to discharge the debt for the real estate and the improvements thereon, and to defray the current expenses of Fairs.

Not for profit.

May fix fee, etc., for membership.

NOTE.—Stats. 1859, p. 104, Sec. 4.

TITLE XV.

GAS CORPORATIONS.

SECTION 628. Corporations to obtain privilege from city or town, and use meters proved by the Inspector.

629. Gas to be supplied on written application. Damages for refusal.

630. When corporations may refuse to supply gas.

631. Agent of corporation may inspect meters.

632. When persons neglect to pay, gas may be shut off.

Corporations to obtain privilege from city or town, and use meters proved by the Inspector.

628. No corporation hereafter formed must supply any city or town with gas, or lay down mains or pipes for that purpose in the streets or alleys thereof, without permission from the city or town authorities, granted in pursuance of the provisions of the Political Code or of statutes expressly continued by such Code. Nor must such corporation furnish or use any gas meter which has not been proved and sealed by the Inspector of Gas Meters.

NOTE.—Stats. 1863, p. 647, Sec. 3.

Gas to be supplied on written application.

629. Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages, for every day such refusal or neglect continues thereafter.

Damages for refusal.

NOTE.—Stats. 1863, p. 647, Sec. 3.

630. No corporation is required to lay service pipe

where serious obstacles exist to laying it, unless the applicant, if required, deposits in advance, with the corporation, a sum of money sufficient to pay the cost of laying such service pipe, or his proportion thereof.

When corporations may refuse to supply gas.

NOTE.—Stats. 1863, p. 647, Sec. 5.

631. Any agent of a gas corporation exhibiting written authority, signed by the President or Secretary thereof for such purpose, may enter any building or premises lighted with gas supplied by such corporation, to inspect the gas meters therein, to ascertain the quantity of gas supplied or consumed. Every owner or occupant of such buildings who hinders or prevents such entry or inspection must pay to the corporation the sum of fifty dollars as liquidated damages.

Agent of corporation may inspect meters.

NOTE.—Stats. 1863, p. 647, Sec. 6.

632. All gas corporations may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied, or the rent for any meter, pipes, or fittings provided by the corporation as required by his contract; and for the purpose of shutting off the gas in such case any employé of the corporation may enter the building or premises of such person, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of any day, and remove therefrom any property of the corporation used in supplying gas.

When persons neglect to pay, gas may be shut off.

NOTE.—Stats. 1863, p. 647, Sec. 7.

TITLE XVI.

LAND AND BUILDING CORPORATIONS.

SECTION 639. How organized.

640. May borrow money.

641. Powers and object of the corporation.

642. May insure the lives of members and debtors.

SECTION 643. What real estate may be owned at any one time.

644. What the by-laws may provide.

645. Secretary must make annual statement, and publish same.

646. Liability of shareholders for debts.

647. Consolidation and transfer of corporation business and property.

648. Married women and minors.

How
organized.

Am 639. Corporations organized under Subdivision 11 of Section 286 may raise funds in shares not exceeding two hundred dollars each, payable in periodical installments. Such bodies are known as land and building corporations, and may be organized with or without a capital stock.

NOTE.—Stats. 1861, p. 567, Sec. 1.

May
borrow
money.

640. Any such corporation may borrow money for the purpose of carrying out its objects, and may give as security therefor its shares or mortgage upon its real estate.

NOTE.—Stats. 1861, p. 567, Sec. 5; 1869, pp. 70, 474, Sec. 1.

Powers and
object of
the corpo-
ration.

641. Any such corporation may purchase real estate and erect buildings for its members, and make loans to its members for the purpose of aiding them in acquiring and improving real estate. Such loan must in all cases be secured on such real estate.

NOTE.—Stats. 1861, p. 567, Secs. 5-18.

May insure
the lives of
members
and
debtors.

642. Such corporation may insure, in some life insurance company incorporated under the laws of this State, the lives of its members and debtors. In case of the death of a debtor or member so insured, the amount recovered on the policy must be applied to extinguish the indebtedness, including the premium paid, and the residue, if any, must be paid to the legal representatives of the decedent.

643. Any such corporation may purchase, hold, and convey real estate, as follows:

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed twenty thousand dollars;

What real estate may be owned at any one time.

2. Such as may from time to time be necessary to supply the wants of its members, the cost of which, held unallotted to the members thereof at any one time, must not exceed the sum of one hundred thousand dollars;

3. Such as shall have been mortgaged, pledged, or conveyed to it in trust, to secure money loaned or to secure the purchase price thereof in pursuance of the regular business of the corporation.

NOTE.—Stats. 1862, p. 199; "Savings and Loan Corporations," Sec. 574.

644. The by-laws of such corporations must specify the amount of the periodical subscriptions or payments to be made by each member, the time and manner in which such payments are to be made; the fines and forfeiture for default; the time and manner of election of Directors and other officers, and their terms of office; the manner in which the real estate may be distributed, allotted, or sold to its members; the terms and conditions upon which loans may be made to its members and by them repaid to the corporation; the manner in which a person may become and cease to be a member; the conditions on which members may withdraw from the corporation, and the provisions for the payment to withdrawing members of the sums of money due to them arising from subscriptions or payments, and the proportion of the profits such withdrawing members may receive on withdrawal.

What the by-laws may provide.

NOTE.—Stats. 1861, p. 567, Sec. 2; 1861, p. 567, Sec. 19; 1867-8, p. 539, Sec. 1.

645. The Secretary of any such corporation must, once in each year during the existence of the corpora-

Secretary must make annual statement, and publish same.

tion, prepare a full and explicit statement of the financial affairs thereof, comprising a balance sheet, statements of receipts and expenditures, profit and loss, and assets and liabilities, which must be audited and verified by two competent persons (not Directors), elected by the general body of shareholders, and be countersigned by the President and Secretary. A copy of such statement must be printed and circulated among the members, and appear immediately after the annual meeting of the corporation daily at least one week, or weekly at least four weeks, in one or more newspapers published at the place of the principal business of the corporation.

NOTE.—Stats. 1861, p. 567, Sec. 9.

Liability of shareholders for debts.

Per 646. Every present and past member of such corporation is personally liable for such proportion of all its debts and liabilities, incurred during his membership, as the number of shares subscribed by him bears to the whole number of subscribed shares; but no past member is liable for such contribution if more than one year has elapsed since he ceased to be a member before suit is commenced, nor for any debt or liability contracted after the time at which he ceased to be a member, nor unless it appears to the Court that the corporation is unable to satisfy such debts and liabilities; nor must any contribution be required from any member or past member exceeding the amount unpaid on the shares in respect of which he is liable.

NOTE.—Stats. 1861, p. 567, Sec. 10.

Consolidation and transfer of corporation business and property.

647. Any two or more such corporations may unite and become incorporated in one body, with or without any dissolution or division of the funds of such corporation, or either of them; or any such corporation may transfer its engagements, funds, and property to any other such corporation, upon such terms as may be agreed upon by two thirds of the members of each of

such bodies present at general meetings of the members, convened for the purpose by notice stating the object of the meeting, sent through the Post Office to every member, and by general notice, appearing daily at least one week, or weekly at least two weeks, in some newspaper published at the place of the principal business of the corporation; but no such transfer can prejudice any right of any creditor of either corporation. Same.

Reh 648. Married women and minors may be admitted as members and may take and hold shares in such corporations, and may execute all necessary instruments and give all necessary acquittances, and sell and transfer their shares, in like manner as other members. Married women and minors.

NOTE.—Stats. 1861, p. 567, Sec. 6.

DIVISION SECOND.

PART I. PROPERTY IN GENERAL.

II. REAL OR IMMOVABLE PROPERTY.

III. PERSONAL OR MOVABLE PROPERTY.

IV. ACQUISITION OF PROPERTY.



PART I.

PROPERTY IN GENERAL.

TITLE I. NATURE OF PROPERTY.

II. OWNERSHIP.

III. GENERAL DEFINITIONS.

TITLE I.

NATURE OF PROPERTY.

SECTION 654. Property, what.

655. In what property may exist.

656. Wild animals.

657. Real and personal.

658. Real property.

659. Land.

660. Fixtures.

661. Fixtures attached to mines.

662. Appurtenances.

663. Personal property.

654. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

Property,
what.

NOTE.—The term "property," as applied to lands, embraces all titles, legal or equitable, perfect or imperfect.—Leese vs. Clark, 20 Cal., p. 387. Debts or credits are property.—Adams vs. Hackett, 7 Cal., p. 187; People vs. McCreery, 34 Cal., p. 447; People vs. Eddy, January Term, 1872. A right of way is an assignable

property.—*Ex parte Coburn*, 1 Cow., p. 570; *Heaton vs. Ferris*, 1 John., p. 146. An easement is real property.—*Wolfe vs. Frost*, 4 Sand. Ch., p. 89; *Foster vs. Browning*, 4 R. I., p. 51; *Buckeridge vs. Ingram*, 2 Ves., Jr., p. 654. Where a street railroad company were authorized to lay down a track in a street, run cars over it, etc., it is an easement in the land, and the estate of the company in the street is real property.—*Appeal of N. B. and M. R. R. Co.*, 32 Cal., p. 499. Franchises are property (*id.*, and cases cited therein), and may be sold under execution.—See Sec. 388, ante.

In what
property
may exist.

655. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trade marks and signs, and of rights created or granted by statute.

NOTE.—The sea, air, light, etc., cannot be the subject of property (ownership). Every one may enjoy them, but he has no exclusive right in them.—*Bouvier Dict.*, "Property." In England one might appropriate the benefits of these, and while occupancy continues he has an ownership, or property, as in case of ancient windows.—*Cooley's Blackst. Comm.*, Vol. II, p. 395, and note. American Courts generally reject the English doctrine respecting the prescriptive right to the enjoyment of light and air, as unsuited to the circumstances of this country.—*Parker vs. Foote*, 19 Wend., p. 309; *Napier vs. Bulwinkle*, 5 Rich., p. 311; *Cherry vs. Stein*, 11 Md., p. 1; *Ingraham vs. Hutchinson*, 2 Conn., p. 597; *Ward vs. Neal*, 37 Ala., p. 500; 2 Washb. Real Prop., p. 62. A right of action is property, and the right depends entirely upon *contracts*, either express or implied.—*Blackst. Comm.*, p. 397. But there are many rights of action springing from *torts* which are recognized as property, and subject to equitable assignment or survivorship to personal representatives, on death of the person entitled to maintain the suit. This is so, generally, as to right of action for such torts as are not merely personal.—*North vs. Turner*, 9 S. and R., p. 244; *McKee vs. Judd*, 12 N. Y., p. 622; *Rice vs. Stone*, 1 Allen, p. 566; *Jordan vs. Gillen*, 44 N. H., p. 424; *Final vs. Backus*, 18 Mich., p. 218; see note to *Cooley's Blackst. Comm.*, Vol. II, p. 397.

656. Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

Wild
animals.

NOTE.—2 Blackst. Comm., p. 403.

657. Property is either:

Real and
personal.

1. Real or immovable; or,
2. Personal or movable.

NOTE.—The term *real*, as applied to property in distinction from *personal*, did not come into general use until as late as the seventeenth century, and after the feudal system had lost its hold. While the feudal law prevailed, the terms were lands, tenements, and hereditaments, and these acquired the name of *real* from the nature of the remedy applied by law for their recovery, differing from that provided in cases of injuries, contracts broken, etc. In the first case the claimant recovered the *real* thing sued for—*i. e.*, the land itself; while in the last case he could ordinarily only recover pecuniary damages. The earliest case in which the terms *real* and *personal* (without words of explanation) are applied to estates is that of *Wind vs. Jekyl et al.*, A. D. 1719, 1 P. Will. Ch., p. 575. The term "*immovables*," as used in the civil law, corresponded to our term *real*, and "*movables*" to our "*personal*."—Williams' Real Prop., pp. 6, 7; Bouvier Law Dict., Real Prop.

658. Real or immovable property consists of:

Real
property.

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law.

NOTE.—2 Blackst. Comm., pp. 16-19; Coke Litt., pp. 4 (a) to 6 (b).

Subd. 2. That which is affixed to land (is real property). But a house may be built on another's land with his consent, and it is the personal property of the builder.—1 Fairfield Rep., p. 429; 18 Me., p. 12, S. P.; 4 Adolph. & Ellis, p. 884; 6 N. H., p. 555; 6 Me., p. 452; 8 Pick. Mass., p. 404. So as to growing trees, as in land hired for nursery purposes.—1 Metc. Mass.,

p. 27; 4 Taunt., p. 816; 7 Barb., p. 263. And, as a general rule, the tenant may remove what he has added, when he can do so without injury to the estate; but as against a vendor, all fixtures pass to his vendee, even though erected for purposes of manufacture or trade, unless specially reserved in the conveyance.—*Sands vs. Pfeiffer*, 10 Cal., p. 258; *McGreary vs. Osborne*, 9 Cal., p. 119. A mortgage upon premises covers the fixtures, even though they are erected subsequently to the mortgage; and an engine and boiler so erected and fastened to a mill passed on foreclosure of the mortgage.—*Sands vs. Pfeiffer*, 10 Cal., p. 258. For removal of fixtures by tenant, etc., see *id.*; *Merritt vs. Judd*, 14 Cal., p. 59; *Woodward vs. Lazar*, 21 Cal., p. 448; 22 Cal., p. 631; 23 Cal., p. 217; 23 Cal., p. 170; 28 Cal., p. 203; 6 Me., p. 154; 20 Wend. N. Y., p. 368; 2 Smith Lead. Cas., Am. Ed., p. 168; 2 Pet., p. 143; 7 Cow. N. Y., p. 319; 1 Wheat., p. 91; 17 Pick., Mass., p. 192; see notes to Secs. 660, 661, 663, and 1013.

Land. **659.** Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

NOTE.—2 Sharswood, Blackst. Comm., p. 18; 3 Kent Comm., p. 378 (n).

Fixtures. **660.** A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

NOTE.—Secs. 658, 660, and 1013 of this Code support the general rule that fixtures, once attached to the freehold, become a part of the realty. How far this rule may be modified as between landlord and tenant depends upon either an express agreement between them, or what may justly be inferred as the evident intention of both parties, and forming an implied agreement.—*Merritt vs. Judd*, 14 Cal., p. 59; see note to Sec. 658, and cases cited. Fixtures, for ornament, convenience, or to carry on a trade, may be removed by tenant who erected them, if removal can be made without injury to the freehold.—16 Day, Con., p. 322; 16 Mass., p. 449; 4 Pick. Mass., p. 310; 7 Barb. N. Y., p. 263; 1 Den. N. Y., p. 92; 19

N. Y., p. 234; see Taylor Landl. and Ten., Secs. 544-550; 10 Cal., p. 258; 22 Cal., p. 631; 23 Cal., p. 217. Removal of fixtures can only be made by tenant during tenancy, and a renewal of a lease terminates the right to remove fixtures.—*Merritt vs. Judd*, 14 Cal., p. 59. As to machinery which is removable by tenant.—1 Mo. Rep., p. 508; 3 Mo. Rep., p. 207; 20 Johns. Rep., p. 29; 4 Moore & Payne, p. 143; 6 Bing. Rep., p. 437; 17 Johns. Rep., p. 116; 3 Vt., p. 425; 3 Backf. Ind. Rep., p. 111; Contra, 6 Bing. N. C., p. 426; 10 Barb. p. 496; 18 Eng. L. and Eq., p. 143; 33 N. H., p. 104; see Kent's Comm., pp. 343-347, and Treatise on Fixtures, by Amos and Ferard; see, also, notes to Secs. 658, 661, and 1013.

661. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine. Fixtures attached to mines.

NOTE.—It was held that a steam engine and boiler, fastened on a frame of timber bedded in the ground for the purpose of working a quartz ledge, is a fixture removable by a tenant if otherwise entitled to remove it.—*Merritt vs. Judd*, 14 Cal., p. 59.

662. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another. Appurtenances.

NOTE.—*Smyles vs. Hastings*, 22 N. Y., pp. 217-222; 21 N. Y., pp. 505-511; 10 C. B., pp. 164-187; 10 Pet., p. 25; *Angell Wat. C.*, p. 43; 1 Serg. & R. Penn., p. 69; 5 id., p. 110. A matter *appendant* arises only by prescription, while a matter *appurtenant* can be created at any time.—3 Kent Com., p. 404; 2 Viner Abr., p. 594. In a deed, the term "appurtenances" will not pass any corporeal real property; it can only pass incorporeal easements, or rights and privileges.—*Coke. Litt.*, p. 121; 8 Barnew. & C., p. 150; 6 Bingh. p. 150; 1 Chitty Pract., pp. 153, 154.

663. Every kind of property that is not real is personal. Personal property.

NOTE.—2 Shars. Blackst. Comm., p. 14 and notes, p. 384 and notes. Growing crops are in certain cases

personal chattels, and in some cases they are part of the realty.—4 Metc. Mass., p. 580; 9 Barnew. & C., p. 561; Hob., p. 173; 1 Atk. Ch., p. 175; 7 N. H., p. 522; 11 Coke, p. 50; 2 Johns. N. Y., pp. 418-421 and notes; 5 Halst. N. J., p. 128. Growing crops are not an interest in real estate within the provision of the statute of frauds requiring such sales to be in writing.—*Marshall vs. Ferguson*, 23 Cal., p. 65; and growing crops are not goods or chattels within the provision of the statute of frauds requiring manual delivery, continued possession, etc.—6 Cal., p. 661; 17 Cal., p. 541; 23 Cal., p. 65. Stock in corporations is personal property.—*Walker Am. Law*, p. 211; 1 *Hilliard Real Prop.*, p. 18. See contra, 2 Conn., p. 567.

TITLE II.

OWNERSHIP.

CHAPTER I. *Owners.*

II. *Modifications of Ownership.*

III. *Rights of Owners.*

IV. *Termination of Ownership.*

CHAPTER I.

OWNERS.

SECTION 669. Owner.

670. Property of the State.

671. Who may own property.

672. Aliens inheriting must claim within five years.

Owner.

669. All property has an owner, whether that owner is the State, and the property public, or the owner an individual, and the property private. The State may also hold property as a private proprietor.

NOTE.—Possession of personal property is *prima facie* (primary) evidence of ownership.—8 Cal., p. 615; 12 Cal., p. 73; 19 Cal., p. 64.

Am 670. The State is the owner of all land below high water mark bordering upon tide water; of all land below the water of a lake or stream which constitutes an exterior boundary of the State; of all property lawfully appropriated by it to its own use; of all property dedicated to the State, and of all property of which there is no other owner. Property of the State.

NOTE.—5 Cal. p. 73; 32 Cal., p. 365. Meaning of "ordinary high water mark."—18 Cal., p. 11. Land belonging to the State.—26 Cal., p. 337; 9 Cal., p. 554; 27 Cal., p. 87. These decisions modified.—29 Cal., p. 317. See, also, Political Code, Part I, Title I, Chapter IV.

Am 671. Any person, whether citizen or alien, may take and hold property, real or personal. Who may own property.

NOTE.—Const., Art. I, Sec. 17; *Ramaratz vs. Kent*, 2 Cal., p. 558; *Attorney General vs. Folsom*, 5 Cal., p. 373; *Sumssen vs. Bofer*, 6 Cal., p. 250; *Norris vs. Hoyt*, 18 Cal. p. 217; *Farrell vs. Enright*, 12 Cal., p. 450; *State of California vs. Rogers*, 13 Cal., p. 159; 26 Cal., p. 55; 32 Cal., p. 376. But an alien cannot hold office.—30 Cal., p. 185.

672. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title VIII, Part III, CODE OF CIVIL PROCEDURE. Aliens inheriting must claim within five years.

NOTE.—Stats. 1856, p. 137; *People vs. Rogers*, 13 Cal., p. 159.

CHAPTER II.

MODIFICATIONS OF OWNERSHIP.

ARTICLE I. INTERESTS IN PROPERTY.

II. CONDITIONS OF OWNERSHIP.

III. RESTRAINTS UPON ALIENATION.

IV. ACCUMULATIONS.

ARTICLE I.

INTERESTS IN PROPERTY.

SECTION 678. Ownership, absolute or qualified.

- 679. When absolute.
- 680. When qualified.
- 681. Several ownership, what.
- 682. Ownership of several persons.
- 683. Joint interest, what.
- 684. Partnership interest, what.
- 685. Interest in common, what.
- 686. What interests are in common.
- 687. Community property.
- 688. Interests as to time.
- 689. Present interest, what.
- 690. Future interest, what.
- 691. Perpetual interest, what.
- 692. Limited interest, what.
- 693. Kinds of future interests.
- 694. Vested interests.
- 695. Contingent interests.
- 696. Two or more future interests.
- 697. Certain future interests not to be void.
- 698. Posthumous children.
- 699. Qualities of expectant estates.
- 700. Same.
- 701. Interests in real property.
- 702. Same.
- 703. What future interests are recognized.

Ownership,
absolute or
qualified.

678. The ownership of property is either :

- 1. Absolute; or,
- 2. Qualified.

When
absolute.

679. The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.

NOTE.—Thus the use of gunpowder is restricted by general laws, but its ownership may nevertheless be justly called absolute. In this State, a claimant to public mineral land has absolute ownership for all practical purposes.—*Merritt vs. Judd*, 14 Cal., p. 59.

When
qualified.

680. The ownership of property is qualified:

1. When it is shared with one or more persons;
2. When the time of enjoyment is deferred or limited;
3. When the use is restricted.

681. The ownership of property by a single person is designated as a sole or several ownership.

Several ownership, what.

682. The ownership of property by several persons is either:

Ownership of several persons.

1. Of joint interests;
2. Of partnership interests;
3. Of interests in common;
4. Of community interest of husband and wife.

683. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

Joint interest, what.

NOTE.—This provision is intended to confine the right of survivorship to cases in which its creation was clearly intended.—Stats. 1855, p. 171, Sec. 1; Dewey vs. Lambier, 7 Cal., p. 347; Bowen vs. May, 12 Cal., p. 351. The act of one joint tenant is the act of all.—24 Cal., p. 634.

684. A partnership interest is one owned by several persons, in partnership, for partnership purposes.

Partnership interest, what.

NOTE.—Collumb vs. Read, 24 N. Y., p. 505; Buchan vs. Sumner, 2 Barb. Ch., p. 165; extending the doctrine of Phillips vs. Phillips, 1 Myl. & K., p. 649; Broom vs. Broom, 3 id., p. 443. See "Partnership," Secs. 2395 to 2520 inclusive.

685. An interest in common is one owned by several persons, not in joint ownership or partnership.

Interest in common, what.

NOTE.—Corporations may hold as tenants in common.—Dewitt vs. San Francisco, 2 Cal., p. 289. A tenant in common may sell out or incumber his interest without regard to knowledge or consent of his co-proprietors, without affecting the legal relations existing between them beyond the going out of

one and coming in of another.—*Bradley vs. Harkness*, 26 Cal., p. 69; see, also, *Gates vs. Salmon*, 35 Cal., p. 576. The owners of water ditches (unless special facts exist constituting them something else) are tenants in common of the real estate, and their rights are controlled by the laws governing tenants in common.—*Id.* Who are tenants in common.—*Reed vs. Spicer*, 27 Cal., p. 57; *Ewald vs. Corbett*, 32 Cal., p. 493; 2 Blackst. Com., p. 191; Bacon Abr.

JOINT TENANTS AND TENANTS IN COMMON.—1 Vern., Ch. 353; Archbold Civ. Plead., pp. 53, 73.

RELATIONS WITH EACH OTHER.—Acquiring co-tenants interest.—*Gunter vs. Laffan*, 7 Cal., p. 588; for tax title to tenant's interest, see also *Mills vs. Tukey*, 22 Cal., p. 373. Abandonment and forfeiture when not presumed or created.—*Waring vs. Crow*, 11 Cal., p. 366. Co-tenant may at any moment reënter into possession, his neglect to do so being regarded as an assent to sole occupation of other (*Pico vs. Columbet*, 12 Cal., p. 414), and tenants in common acting under company name, owning mining claims, cannot hold by forfeiture in company name the interest of any co-tenant.—*Wiseman vs. McNulty*, 25 Cal., p. 230. Disposition of rents and profits, and when co-tenant is entitled to allowances for personal expenses and outlays.—*Goodenow vs. Ewer*, 16 Cal., p. 461; *Pico vs. Columbet*, 12 Cal., p. 414; *Raun vs. Reynolds*, 18 Cal., p. 275. No action of a portion of several tenants can impair the rights of their co-tenants.—*Mahoney vs. Van Winkle*, 21 Cal., p. 552. Heirs of any co-tenant entitled to possession.—*McLearnan vs. Benton*, 31 Cal., p. 29. Right of partition may be exercised at any time.—*Stark vs. Barrett*, 15 Cal., p. 361; see, also, *Gates vs. Salmon*, 35 Cal., p. 576. And as to actions between tenants in common; forcible entry—*Lick vs. O'Donnell*, 3 Cal., p. 59; trover—*Williams vs. Chadbourne*, 6 Cal., p. 559; ejectment—*Ewald vs. Corbett*, 32 Cal., p. 493; trespass—*Woodbeck & M. vs. Wilders*, 18 Cal., p. 131; partition—*Sutter vs. San Francisco*, 36 Cal., p. 112; *Abel vs. Love & Fowler*, 17 Cal., p. 233; *Siter vs. Jewett*, 33 Cal., p. 96. One of several tenants in common may sue alone for his moiety.—*Covillaud vs. Tanner*, 7 Cal., p. 38; *Ross vs. Heintzen*, 36 Cal., p. 313. Unity of possession.—*Tavis vs. Hicks*, 38 Cal., p. 234. Possession of one tenant in common is the possession of all (*Waring vs. Crow*, 11 Cal., p. 366; *Knox vs. Marshall*, 19 Cal., 617; *Carpentier vs. Webster*, 27 Cal., p. 524; 28 Cal., p. 485; 29 Cal., p. 162; *id.*, p. 333); and in order to rebut this presumption the

intention to hold adversely must be shown, and such intent must be indicated by acts calculated to exclude the co-tenant.—*Coleman vs. Clements*, 23 Cal., p. 245; *Owen vs. Morton*, 24 Cal., p. 373. If one who took possession of land unlawfully should afterward become a tenant in common in the ownership of the same, at that moment his possession loses its hostile character, and the presumption is (until the contrary appears) that it is amicable.—*Carpentier vs. Mendenhall*, 28 Cal., p. 484. Any act of a co-tenant in exclusive possession, which manifests an intention to hold exclusively for himself, is equivalent to an actual ouster.—*Owen vs. Morton*, 24 Cal., p. 373; see, also, *Carpentier vs. Webster*, 27 Cal., p. 524; *Carpentier vs. Mendenhall*, 28 Cal., p. 484; *Carpentier vs. Gardiner*, 29 Cal., p. 160. But taking actual possession of land under a deed which purports to convey the whole thereof (with a belief that it does so convey the whole), when in fact it gives title to an undivided portion only, is not an ouster of a tenant in common owning the other undivided part.—*Seaton vs. Son*, 32 Cal., p. 481. Proof of an ouster.—*Hebrard vs. Jefferson G. & S. M. Co.*, 33 Cal., p. 390; and for damages for ouster, see 29 Cal., p. 330, and other cases above cited. One tenant in common may purchase an outstanding or adverse title, but he cannot acquire such a title solely for his own benefit and to the exclusion of his co-tenant.—*Mandeville vs. Soloman*, 39 Cal., p. 125. But the co-tenant must exercise a reasonable diligence in making his election, to participate in the benefit of the new acquisition; and unless within reasonable time he does so, he is deemed to repudiate the transaction and abandon its benefits.—*Id.*

RELATIONS WITH THIRD PARTIES.—One tenant in common may sue and recover possession from any party in adverse possession (*Collier vs. Corbett*, 15 Cal., p. 183; *Treat vs. Reilly*, 35 Cal., p. 129); and a tenant in common of an undivided portion of a tract of land is entitled to the possession of the whole tract against all persons except his co-tenants, and may maintain ejectment against such persons and recover the entire premises (*Fouchard vs. Crow*, 20 Cal., p. 150; *Mahoney vs. Van Winkle*, 21 Cal., p. 552; *Hart vs. Robertson*, 21 Cal., p. 846; *Rowe vs. Bacigalluppi*, 21 Cal., p. 633), but could not recover in such action the whole of the mesne profits or damages for detention, but only a part thereof, proportional to his interest

(Clark vs. Huber, 20 Cal., p. 196; Muller vs. Boggs, 25 Cal., p. 175). Yet the Supreme Court will not reverse, but only modify such a judgment.—*Id.*, and Hicks vs. Coleman, 25 Cal., p. 145. A purchaser at a Constable's sale on execution does not acquire any title against a tenant in common not served with process, and who did not appear.—*Wiseman vs. McNulty*, 25 Cal., p. 230; see, also, *Ross vs. Heintzen*, 36 Cal., p. 313. A conveyance by one tenant in common, or any number less than the whole, of a specific portion of the common lands, is not void; it does not prejudice the co-tenants not uniting in the conveyance. The grantee takes the interest of the grantor in the special tract, which interest is a tenancy in the special tract with the co-tenants of the grantor.—*Gates vs. Salmon*, 35 Cal., p. 576; see further, *Lawrence vs. Ballou*, 37 Cal., p. 518.

What
interests
are in
common.

686. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in Section 683, or unless acquired as community property.

NOTE.—Stats. 1855, p. 171, Sec. 1. See *Downing vs. Marshall*, 23 N. Y., pp. 366-388; *Coster vs. Lorillard*, 14 Wend., p. 343. See notes to Secs. 683, 684.

Communi-
nity
property.

687. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.

NOTE.—Civil Code of Louisiana, p. 370, Art. 2370, et seq. See *Husband and Wife*, Secs. 155 to 181 inclusive.

Interests as
to time.

688. In respect to the time of enjoyment, an interest in property is either :

1. Present or future; and,
2. Perpetual or limited.

NOTE.—These distinctions exist in regard to personal property as well as real.—*Westcott vs. Cady*, 5 Johns. Ch., p. 334; *Gillespie vs. Miller*, id., p. 21; *Randall vs. Russell*, 3 Meriv., p. 190; *Hyde vs. Parrott*, 1 P. Wms., p. 1; 2 Vern, p. 331; *Smith vs. Clever*, id., p. 59; *Upwell vs. Halsey*, 1 P. Wms., p.

651; see *Phelps vs. Pond*, 23 N. Y., p. 60; 28 Barb., p. 121; *Kane vs. Astor*, 5 Sandf., p. 467; *Beeckman vs. Schermerhorn*, 3 Sandf. Ch., p. 181; *Mason vs. Jones*, 2 Barb., p. 229.

689. A present interest entitles the owner to the immediate possession of the property. Present interest, what.

690. A future interest entitles the owner to the possession of the property only at a future period. Future interest, what.

NOTE.—Thus a reversion, as well as a remainder, is a future estate. They are both expectant estates.

691. A perpetual interest has a duration equal to that of the property. Perpetual interest, what.

692. A limited interest has a duration less than that of the property. Limited interest, what.

693. A future interest is either :

1. Vested; or,
2. Contingent.

Kinds of future interests.

NOTE.—So, also, with personal property.—*Phelps, Ex'r. vs. Pond*, 23 N. Y., p. 69.

694. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest. Vested interests.

NOTE.—The words "defeasible or indefeasible" obviate the objection that a future interest might be vested, and also contingent (*Coster vs. Lorillard*, 14 Wend. p. 302); *e. g.*, a remainder to descendants in being subject to open and let in after-born descendants. Such remainders have always been held to be vested.—*Powers vs. Bergen*, 6 N. Y., p. 360; *Root vs. Stuyvesant*, 18 Wend., p. 268; *Dubois vs. Ray*, 7 Bosw., p. 287; *Williamson vs. Field*, 2 Sandf. Ch., p. 533.

695. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain. Contingent interests.

Two or
more future
interests.

696. Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

NOTE.—*Loddington vs. Kime*, 1 *Ld. Raym.*, p. 208; 2 *Smith's Fearn*e, p. 43.

Certain
future
interests
not to be
void

697. A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

Posthu-
mous
children.

698. When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

NOTE.—*Stats.* 1855, p. 171, Sec. 5; *Mason vs. Jones*, 2 *Barb.*, pp. 234-252.

Qualities of
expectant
estates.

699. Future interests pass by succession, will, and transfer, in the same manner as present interests.

NOTE.—*Wood vs. Keyes*, 8 *Paige*, pp. 365-368; *Wendell vs. Crandall*, 1 *N. Y.*, p. 491; *Pond vs. Bergh*, 10 *Paige*, pp. 140-154; *Lawrence vs. Bayard*, 7 *Paige*, pp. 70-76; *Grout vs. Townsend*, 2 *Hill*, pp. 554-557.

Same.

700. A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

NOTE.—*Jackson vs. Bradford*, 4 *Wend.*, p. 619; *Tooley vs. Dibble*, 2 *Hill*, p. 641; see *Conderman vs. Smith*, 41 *Barb.*, p. 404; *Miller vs. Emans*, 19 *N. Y.*, p. 384.

Interests in
real
property.

701. In respect to real or immovable property, the interests mentioned in this Chapter are denominated estates, and are specially named and classified in Part II of this Division.

NOTE.—It has been deemed undesirable to apply the technical name of estates in real property to interests in personal property, although there are precedents for such a course.

Same.

702. The names and classification of interests in

real property have only such application to interests in personal property as is in this Division of the Code expressly provided.

703. No future interest in property is recognized by the law, except such as is defined in this Division of the Code.

What
future
interests
are
recognized.

ARTICLE II.

CONDITIONS OF OWNERSHIP.

SECTION 707. Fixing the time of enjoyment.

708. Conditions.

709. Certain conditions precedent void.

710. Conditions restraining marriage void.

711. Conditions restraining alienation void.

707. The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.

Fixing the
time of
enjoyment.

NOTE.—For conditions of ownership or estates on condition generally see Greenlf. Cruis., Tit. 13, Chs. 1 and 2; 2 Shars. Blackst. Comm., Ch. 10; Kent's Comm., Sec. 57; 3 Coke Litt., pp. 201a-237a; Shep. Touchst., Ch. 6; Bouv. Law Dict., Tit. "Condition." As to what words create a condition, see Greenlf. Cruis. Real Prop., Tit. 32, Ch. 25, Secs. 2-11, and notes; also, 2 Shars. Blackst. Comm., p. 152, note 1. The word "if" generally creates a condition, but sometimes only a limitation.—Co. Litt., pp. 204a-214b; Shep. Touchst., p. 123. Conditions which go to defeat an estate are strictly construed, while those which go to vest an estate are liberally construed.—Crabb. Real Prop., Sec. 2130; 4 Gray Mass., p. 140. When there is a condition subsequent, and performance is rendered impossible by act of covenantor or party in whose favor it is to be performed, it becomes void.—United States vs. Arredondo, 6 Pet., pp. 691, 745; Whitney vs. Spencer, 4 Cowen, p. 39. If the condition is impossible at time of its creation (as to pay money at a day already past), it is void; but if it is a mortgage, remedy in equity is preserved.—Hughes vs. Edwards, 9 Wheat., pp. 489-493. Equity will not allow any

one to take advantage of a bequest over, who has himself been instrumental in causing the breach of a condition.—*Garrett vs. Pretty*, stated from Reg. Lib. in 3 Meriv., p. 120; *Clarke vs. Parker*, 10 Ves., p. 12; 2 Ves. and Bea., p. 225. But where a condition is annexed by will to a devise or bequest, and no one is bound to give notice of such condition, the parties must themselves take notice of and perform the condition, in order to avoid forfeiture.—2 *Atk.*, p. 619; 1 *Mod.*, p. 314; 3 *Meriv.*, p. 9; *Show. P. C.*, p. 50. Infancy will in such case be no excuse for non-performance of condition.—2 *Freem.*, p. 221; 1 *Ventr.*, p. 200. But for instance of modification of this rule, see *Burleton vs. Homfray*, *Ambl.*, p. 259. See further this Code, “Covenants,” “Mortgages,” and notes upon those subjects, and see note to Sec. 708, post.

Conditions. 708. Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right.

NOTE.—Whether conditions are precedent or subsequent depends on the intent of the parties, to be collected from the nature of the case (*Kingston vs. Preston*, 1 *Doug.*, pp. 689-691; 1 *Saund.*, p. 320, note by *Sgt. Williams*; *Tompkins vs. Elliot*, 5 *Wend.*, p. 497; *Barruso vs. Madan*, 2 *Johns.*, p. 148), and does not depend upon the precise form of words used, nor upon the position of the words in the instrument.—7 *Gill. and I. Md.*, pp. 227-240; 2 *Dall. Penn.*, p. 317; 20 *Barb. N. Y.*, p. 425; 6 *Me.*, p. 106; *id.*, p. 318; 1 *Va. Cas.*, p. 138; 6 *Litt. Ky.*, p. 151; 1 *Spenc. N. J.*, p. 435; 1 *La. Ann.*, p. 424; 1 *Wisc.*, p. 527. For conditions precedent and subsequent see 1 *Cal.*, p. 337; 2 *Cal.*, p. 138; *id.*, 163; 26 *Cal.*, p. 11; 30 *Cal.*, p. 325; 10 *Cal.*, p. 589; 13 *Cal.*, p. 458; 10 *Cal.*, p. 95; *id.*, p. 450; 6 *Cal.*, p. 297; *id.*, p. 24; 17 *Cal.*, p. 275; 16 *Cal.*, p. 189; 24 *Cal.*, p. 632; 30 *Cal.*, p. 280; 15 *Cal.*, p. 630; 34 *Cal.*, p. 138; 1 *Doug. Mich. R.*, p. 225; *id.*, p. 527; 3 *Pike*, p. 222; 4 *Rand.*, p. 352; 9 *Mass.*, p. 78; 15 *Mass.*, p. 500; 2 *Pick.*, p. 292; 3 *Pet.*, pp. 346-374; 1 *Ham.*, p. 14; 10 *Johns.*, p. 203; 7 *Johns.*, p. 249; 15 *Wend.*, p. 564; 5 *Pick.*, p. 528; 10 *Pick.*, p. 309; 6 *Greenl.*, p. 106; 2 *Fairf.*, p. 318; *Platt on Covenants*, Ch. 2, Sec. 5; see also *Greenlf. Cruis. Real Prop.*, Tit. 13, Ch. 1, Sec. 6, and note. And for mutual covenants, see, further, 2 *Johns.*, p. 207; 10 *Johns.*, p. 266; 16 *Johns.*, p. 267; 17 *Johns.*, p. 293; 5 *Pick.*, p. 395; 2 *Metc.*, p. 500; 4 *Conn. R.*, p. 3; 3 *Rand.*, p. 68. See note to Sec. 707, ante.

Compare the last two sections with Sections 1434 to 1442, post.

709. If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void.

Certain conditions precedent void.

NOTE.—All the instances of conditions against law are reducible under one of these heads: 1. To do something that is *malum in se* or *malum prohibitum*; 2. To omit something that is a duty; 3. To encourage such crimes and omissions.—1 P. Wms., p. 189; Greenlf. Cruis., Tit. 13, Ch. 1, Sec. 19. Compare this with Section 1441, post, and note.

Am 710. Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void.

Conditions restraining marriage void.

NOTE.—In the first report of this Code to the Legislature this section read as follows:

"Sec. 710. Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage."

This was the rule of the common law. The Commission deemed it advisable to modify it. By the common law a condition restraining a widow from a second marriage might be held good. The authorities as to the validity of a condition restraining a widow from marriage are conflicting. It seems, however, generally settled by the English authorities, that a condition imposing such restraint was valid (10 Eng. L. & Eq., p. 139); and Justice Story so holds, saying that: "A condition that a widow shall not marry is not unlawful, neither is an annuity during widowhood (1 Eq. Juris., Sec. 289); but this has been questioned; and in *Parsons vs. Winslow* (6 Mass., p. 169), where the legacy was during widowhood and life, it was held that the legatee took notwithstanding subsequent marriage.—See *Hooper vs. Dundas*, 10 Barr., p. 75; 10 Watts, p. 348; but see 1 Atk., p. 379, 1 Mad., p. 590; 2 Atk., p. 321.

"It is conceded that if an estate be limited to a widow so long as she remains unmarried, the limitation is good; but it is said that a condition subsequent to like effect is void. Where a testator directed his executors

to pay his wife an annuity for the support of herself and child until his son should become of age, *provided* she remained his widow so long, and in case she again married, the bequest to cease from the day of such marriage, it was held that the restriction upon her marriage was void, and she was entitled to the annuity until the majority of the son."—*Middleton vs. Rice*, S. J. C., Pennsylvania; 1 Pa. Law Jour., p. 229, N. S.; Greenl. Cruise, Real Prop., Tit. 13, Ch. 1, Sec. 66, note. In this case the authorities cited by Justice Story in favor of such restraint were cited and disapproved. Where a married woman lived apart from her husband, and her father bequeathed to her an annuity, to cease if and while she should again live with him, the restriction was held void.—See note to Greenl. Cruise, above cited.

The Commission, in presenting the above section, have declared that all conditions imposing (any) restraint upon marriage, except upon the marriage of a minor, are void. All such restraints are odious, and the reasons which are to be advanced against restraints upon marriage generally would be equally applicable to restraints upon the marriage of widows. Even a condition in restraint of marriage with some particular person would often have the effect of a virtual prohibition of marriage. A condition that a "child should not marry until fifty years of age, or should not marry any person who was a clergyman, a physician, or a lawyer, or any person except of a particular trade," Mr. Justice Story thinks would be considered a general restraint, and "be deemed a mere evasion or fraud upon the law."—Story Eq. Juris., Sec. 287. Conditions in restraint of marriage of person arrived at years of discretion must, as a general rule, be regarded as unfavorable to the welfare, good order, and general happiness of society.—See 2 Redfield on Wills (edition of 1866), p. 670, and notes. Compare with Section 1676, post, and note.

Conditions
restraining
alienation
void.

711. Conditions restraining alienation, when repugnant to the interest created, are void.

NOTE.—*De Peyster vs. Michael*, 6 N. Y., p. 496. A condition in general restraint of alienation is void (1 Den., N. Y., p. 449; 14 Miss., p. 730; 24 id., p. 203; 6 East., p. 173; 21 Pick., Mass., p. 42), but a restraint of alienation for a limited time may be good.—*Coke Litt.*, p. 223; 2 Serg. & R., Penn., p. 573; 1 Watts, Penn., p. 339; 10 id., p. 325.

ARTICLE III.

RESTRAINTS UPON ALIENATION.

SECTION 715. How long it may be suspended.

716. Future interests void, which suspend power of alienation.

717. Leases of agricultural land, for over ten years, void.

718. Leases of city lots, for over twenty years, void.

715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in Section 772.

How long
it may be
suspended.

NOTE.—This includes a trust of real property.—Coster vs. Lorillard, 14 Wend., pp. 265, 313; Hawley vs. James, 16 id., pp. 121, 173, 174, 208; Kane vs. Gott, 24 id., pp. 641, 662, 667; Hone vs. Van Schaick, 20 Wend., pp. 564, 566; Boynton vs. Hoyt, 1 Den., pp. 53, 58; Beekman vs. Bonsor, 23 N. Y., pp. 298, 316. The words "limitation or condition" are substituted for "estate," so as to include powers. See Hawley vs. James, 16 Wend., pp. 135, 178, 208; Coster vs. Lorillard, 14 id., 324, 325; Hone vs. Van Schaick, 20 id., pp. 566, 567, 569.

716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this Chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Future
interests
void, which
suspend
power of
alienation.

NOTE.—Hawley vs. James, 16 Wend., pp. 120, 126, 171, 178, 227; Everitt vs. Everitt, 29 Barb., p. 112; Jennings vs. Jennings, 7 N. Y., pp. 547-549; Amory vs. Lord, 9 id., p. 415; Thompson vs. Carmichael's Executors, 1 Sandf. Ch., p. 395; Arnold vs. Gilbert, 3 id., p. 558.

Leases of
agricul-
tural land,
for over ten
years, void.

717. No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid.

NOTE.—Stats. 1851, p. 169, Sec. 1.

Leases of
city lots,
for over
twenty
years, void.

718. No lease or grant of any town or city lot, for a longer period than twenty years, in which shall be reserved any rent or service of any kind, shall be valid.

NOTE.—Stats. 1851, p. 169, Sec. 1.

ARTICLE IV.

ACCUMULATIONS.

SECTION 722. Dispositions of income.

723. Accumulations, when void.

724. Accumulation of income.

725. Other directions, when void in part.

726. Application of income to support, etc., of minor.

Disposi-
tions of
income.

722. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in this Title in relation to future interests.

Accumula-
tions, when
void.

723. All directions for the accumulation of the income of property, except such as are allowed by this Title, are void.

NOTE.—Titus vs. Weeks, 37 Barb., pp. 136, 146;
Vail vs. Vail, 4 Paige, p. 317; Levy vs. Levy, 40
Barb., pp. 590-618.

Accumula-
tion of
income.

724. An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more

minors then in being, and terminate at the expiration Same.
of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this Title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority.

NOTE.—*Boynton vs. Hoyt*, 1 Den., pp. 53, 58; *Hawley vs. James*, 16 Wend., p. 117; *Gilman vs. Reddington*, 24 N. Y., p. 19; *Kilpatrick vs. Johnson*, 15 N. Y., p. 322; *Mason vs. Jones*, 2 Barb., pp. 250-253.

725. If in either of the cases mentioned in the last section the direction for an accumulation is for a longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.

Other directions, when void in part.

NOTE.—The clause from "only" to "instrument" is sustained by *Williams vs. Williams*, 8 N. Y., p. 425; *Kilpatrick vs. Johnson*, 15 N. Y., p. 322. See, however, *King vs. Rundle*, 15 Barb., pp. 139-145.

726. When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the proper Court, upon application, may direct a suitable sum to be applied thereto out of the fund.

Application of income to support, etc., of minor.

NOTE.—See Code of Civil Procedure, Sections 1792 and 1771, relating to investment of the ward's estate and the payment for his support and maintenance. The provisions of Section 1771 of the Code of Civil Procedure became necessary under the decision of the Supreme Court of this State in the case of *Swift vs. Swift*, 40 Cal., p. 457.

CHAPTER III.

RIGHTS OF OWNERS.

SECTION 732. Increase of property.

733. In certain cases who entitled to income of property.

Increase of
property.

732. The owner of a thing owns also all its products and accessions.

NOTE.—2 Kent's Comm., p. 360; 2 Blackstone's Comm., p. 404; Bouvier Inst., pp. 2, 1, 29, 30. Where the property of two persons are by their joint labor united, in the absence of an agreement the joint product is the property of the owner of the principal part.—7 Johns., N. Y., p. 473; 5 Pick., p. 177; 6 id., p. 209; 32 Me., p. 404; 16 Conn., p. 322; Bouvier Inst., p. 2, 1, 26. Vessels built of materials belonging to different persons, it is said, belong to the owner of the keel.—2 Kent., p. 361; 6 Pick., p. 209.

In certain
cases, who
entitled to
income of
property.

733. When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

NOTE.—Held to apply to personal property.—*Gilman vs. Reddington*, 24 N. Y., p. 19; *Kilpatrick vs. Johnson*, 15 id., p. 322. But see *Phelps, exr., vs. Pond*, 23 N. Y., p. 83. In *Odell vs. Odell*, 10 Allen, (Mass.,) p. 1, Mr. Justice Gray held that: "Where the accumulation of a portion of the income of real estate was directed in a will for fifty years, and then to be applied to establish a charity, and it was held a valid bequest, even if the accumulation cannot be allowed for so long a period."—2 Redfield Law of Wills, (ed. 1866,) p. 821, Sec. 70. At common law, originally, no accumulation was allowed beyond the period of a life or lives in existence at the decease of the testator, and twenty-one years and a fraction thereafter, to allow a minor devisee to obtain his majority; and the fraction over twenty-one years was added, thus treating infants as in esse during the period of gestation.—Redfield 2, (id. ed.,) p. 821; Tudor, p. 252. But the House of Lords, in *Cadell*

vs. Palmer, 7 Bligh., p. 202; S. C., 10 Bing., p. 140; Cl. & Fin., p. 372, put this matter at final rest, determining in these cases that the true limit against perpetuities was "a life or lives in being, and twenty-one years, without reference to the infancy of any person whatever." In the great *Thellusson* will case, (*Thellusson vs. Woodford*, 4 Vesey, p. 227), being the case on which was founded the famous *Thellusson* Act, it was held that "where there is a present gift in possession, and the direction for accumulation is merely given to govern the mode of enjoyment, the result is to give those entitled the present income, the same as if the direction had not been given."—2 Redfield, (1866 ed.,) pp. 839, 840; *Clulow's Trust*, 5 Jur., (N. S.), p. 1002; *Trickey vs. Trickey*, 3 My. & K., 560; 1 Jacman, p. 291. In *Coombe vs. Hughes*, 11 Jur., (N. S.), p. 194; *Rolls. Chanc. Appeal*, p. 380, (1865), if a will makes an absolute gift and a direction to accumulate more than twenty-one years, the income after the twenty-one years passes under the previous gift, and not undisposed of.

CHAPTER IV.

TERMINATION OF OWNERSHIP.

SECTION 739. Future interests, when defeated.

740. Same.

741. Future interests, when not defeated.

742. Same.

739. A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

Future
interests,
when
defeated.

NOTE.—Stats. 1855, p. 171, Sec. 4. In England it was held by the Court of Common Pleas, and of King's Bench, that there could be no interval or meantime between the termination of the particular estate supporting the remainder and the vesting of the remainder. A strict application of this rule was held to exclude a posthumous child from taking a contingent remainder when the particular estate terminated before it was born (see *Reeve vs. Long*, 1 Salk., p. 227), but this decision was reversed by the House of Lords, and

it has long been the settled law, in both England and this country, that an infant in its mother's womb is deemed to be in existence for the purpose of taking a remainder, whether by succession or by devise.—Willes, C. J., in *Goodtitle vs. Wood*, 7 Tenn. Rep., p. 103, and note; *Stedfast vs. Nicoll*, 3 Johns. Cas., p. 18; *Swift vs. Duffield*, 5 Serg. and Rawle, p. 38. It has been decided that, as to the rights of others, a child born dead, within such an early stage of pregnancy as to be incapable of living, is deemed not to have been in existence; and a child born within six months after conception is presumed incapable of living.—*Harper vs. Archer*, 4 Smede & Marshall, p. 99; *Marsellis vs. Thalkimer*, 2 Paige, p. 35. See, also, 4 Kent's Comm., p. 248; La. Code, Art. 205.

Same.

740. A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

Future interests, when not defeated.

741. No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

NOTE.—A contingent remainder, requiring by common law a particular estate to support it, could never be held in abeyance. If the particular estate terminated, in whatsoever manner, before the remainder could vest, the remainder was gone forever. A freehold could not commence *in futuro*. It followed that if the particular estate terminated before the happening of the contingency, the remainder was destroyed. Thus the particular estate might be destroyed by fire, feoffment, or by a merger, and the remainder fell with it. The policy of legislation generally, however, has been to place contingent remainders beyond the reach of accident to the precedent estate.—1 N. Y. R. S., p. 725, Secs. 32, 35. So in Virginia (see *Lomax's Digest*, Vol. 1, p. 457.) Thus the N. Y. statute renders

expectant estates no longer dependent on the continuance of the precedent estate, and the Revised Code of Mississippi declares the same rule and allows an estate of inheritance or freehold to commence *in futuro*.—Code of 1824, p. 459. See 4 Kent's Com., pp. 253-256. Much nice learning has been thrown around the subject of contingent remainders, and many nice distinctions and refinements have accumulated, but in many of the States, and by this Code, future interests include all estates in expectancy, vested, and contingent, and all future interests are descendible, devisable, and alienable in the same manner as estates in possession, so that a thorough examination of the common law rules concerning remainders, and the delicate questions springing therefrom, must be esteemed as of more interest in showing the learning and scholarly attainments of the early law writers rather than as of any practical utility.

742. No future interest, valid in its creation, is ^{Same.} defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

NOTE.—See note to preceding section. For varied learning upon the subject of contingent remainders see the admirable work of "Ferne on Contingent Remainders."

TITLE III.

GENERAL DEFINITIONS.

SECTION 748. Income, what.

749. Time of creation, what.

748. The income of property, as the term is used ^{Income, what.} in this Part of the Code, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property.

Time of
creation,
what.

749. The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this Part of the Code.

NOTE.—Lang vs. Ropke, 5 Sandf., pp. 369, 370.

PART II.

REAL OR IMMOVABLE PROPERTY.

TITLE I. GENERAL PROVISIONS.

II. ESTATES IN REAL PROPERTY.

III. RIGHTS AND OBLIGATIONS OF OWNERS.

IV. USES AND TRUSTS.

V. POWERS.

TITLE I.

GENERAL PROVISIONS.

SECTION 755. Real property, how governed.

Am 755. Real property within this State is governed
by the law of this State, *as in the U.S.*

Real
property,
how
governed.

TITLE II.

ESTATES IN REAL PROPERTY.

CHAPTER I. *Estates in General.*

II. *Termination of Estates.*

III. *Servitudes.*

CHAPTER I.

ESTATES IN GENERAL.

SECTION 761. Enumeration of estates.

- 762. What estate a fee simple.
- 763. Conditional fees and estates tail abolished.
- 764. Certain remainders valid.
- 765. Freeholds. Chattels real. Chattel interests.
- 766. Estates for life of a third person, when a freehold, etc.
- 767. Future estates, what.
- 768. Reversions.
- 769. Remainders.
- 770. Limitations of chattels real.
- 771. Suspension by trust.
- 772. Contingent remainder in fee.
- 773. Remainders, future and contingent estates, how created.
- 774. Limitation of successive estates for life.
- 775. Remainder upon estates for life of third person.
- 776. Contingent remainder on a term of years.
- 777. Remainder of estates for life.
- 778. Remainder upon a contingency.
- 779. Heirs of a tenant for life, when to take as purchasers.
- 780. Construction of certain remainders.
- 781. Effect of power of appointment.

Enumera-
tion of
estates.

761. Estates in real property, in respect to the duration of their enjoyment, are either:

1. Estates of inheritance or perpetual estates;
2. Estates for life;
3. Estates for years; or,
4. Estates at will.

NOTE.—“Estates by sufferance” are included in the phrase “Estates at will.”

What
estate a
fee simple.

Am 762. Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defeasible or conditional, is called a fee simple absolute, or an absolute fee.

NOTE.—2 Shars. Blackst. Comm., p. 106; Plowd., p. 557; 1 Preston Est., p. 425; 1 Wash. Real Prop., p. 51. The word “simple” does not add any significance. It is used merely to mark more fully the distinction be-

tween an unqualified fee and a fee tail, or any class of conditional estates.

763. Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple; and if no valid remainder is limited thereon, is a fee simple absolute.

Conditional fees and estates tail abolished.

NOTE.—An inheritable estate which will descend to certain classes of heirs is called an "estate in fee tail," or an "estate tail." The words "heirs of the body of," etc., were the proper words creating such an estate.—1 Wash. Real Prop., pp. 51, 66; see also Bouv. L. Dict., "Estate in fee tail."

764. Where a remainder in fee is limited upon any estate, which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker, without issue living at the time of his death.

Certain remainders valid.

765. Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

Freeholds. Chattels real. Chattel interests.

NOTE.—Crabb Real Prop., Sec. 945; 1 Wash. Real Prop., p. 51; 1 Stephen Comm., p. 218. Estates for years, chattels real.—Pugsley vs. Aiken, 11 N. Y., p. 498; Averill vs. Taylor, 8 N. Y., p. 52; Bigelow vs. Finch, 17 Barb., p. 396. Estates at will, chattel interest not liable to sale on execution.—Dickinson vs. Smith, 25 Barb., p. 108; Bigelow vs. Finch, 11 Barb., p. 498.

Am

766. An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.

Estate for life of a third person, when a freehold, etc.

NOTE.—Corresponds to estate *per autre vie*.—1 Wash. Real Prop., p. 88; 2 Shars. Blackst. Comm., p. 120; Mosher vs. Yost, 33 Barb., p. 277.

767. A future estate may be limited by the act of the party to commence in possession at a future day,

Future estates, what.

Same. either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

NOTE.—See note to Sec. 741, ante. The definition in this section comprehends every species of expectant estates created by the act of the party; remainders strictly so called, future uses and executory devises. The words, with or without the intervention of precedent estate, embrace what are technically known as estates *in futuro*. The words “lapse of time or otherwise,” provide for contingent limitations operating to abridge or defeat the prior estate.—*Nicoll vs. N. Y. and Erie R. R.*, 12 N. Y. Rep., pp. 121, 139. Expectant estates, says Chancellor Walworth, “include every present right and interest, either vested or contingent, which may by possibility vest at a future day.”—*Lawrence vs. Bayard*, 7 Paige, p. 76.

Reversions. 768. A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Remainders. 769. When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

NOTE.—See notes to Sections 741 and 742, ante.

Limitations of chattels real. 770. The provisions of Title II of Part I of this Division, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

Suspension by trust. 771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Sec. 715.

NOTE.—Hawley vs. James, 16 Wend., p. 163; Belmont vs. O'Brien, 12 N. Y., p. 402; Williams vs. Williams, 8 N. Y., p. 531.

772. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

Contingent remainder in fee.

NOTE.—Temple vs. Hawley, 1 Sandf. Ch., p. 153.

773. Subject to the rules of this Title, and of Part I of this Division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Title.

Remainders, future and contingent estates, how created.

NOTE.—Maurice vs. Graham, 8 Paige, pp. 483, 486; Sherman vs. Sherman, 3 Barb., p. 385.

Am 774. Successive estates for life cannot be limited, except to persons in being at the creation thereof; and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estates had been created.

Limitation of successive estates for life.

NOTE.—Amory vs. Lord, 9 N. Y., p. 419; Vail vs. Vail, 7 Barb., p. 241.

Am 775. No remainder can be created upon successive estates for life, unless such remainder is in fee; nor can a remainder be created upon such estates in a term for years, unless it is for the whole residue of such term.

Remainder upon estates for life of third person.

776. A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such that the remainder must

Contingent remainder on a term of years.

vest in interest during the continuance or at the termination of lives in being at the creation of such remainder.

NOTE.—Butler vs. Butler, 3 Barb. Ch., p. 304.

Remainder of estates for life.

777. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

NOTE.—Hawley vs. James, 16 Wend., p. 248.

Remainder upon a contingency.

778. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

NOTE.—Tyson vs. Blake, 22 N. Y., p. 563.

Heirs of a tenant for life, when to take as purchasers.

779. When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

Construction of certain remainders.

780. When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

Effect of power of appointment.

781. A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

NOTE.—Root vs. Stuyvesant, 18 Wend., p. 268; 2 Smith's Fearn, p. 193.

CHAPTER II.

TERMINATION OF ESTATES.

SECTION 789. Tenancy at will may be terminated by notice.

790. Effect of notice.

791. Reëntry, when and how to be made.

792. Summary proceedings in certain cases provided for.

793. Notice not necessary before action.

789. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by Section 1162 of the CODE OF CIVIL PROCEDURE, to remove from the premises within a period of not less than one month, to be specified in the notice.

Tenancy at will may be terminated by notice.

790. After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may reënter, or proceed according to law to recover possession.

Effect of notice.

NOTE.—"But not before;" see *Livingston vs. Tanner*, 14 N. Y., p. 67.

791. Whenever the right of reëntry is given to a grantor or lessor in any grant or lease, or otherwise, such reëntry may be made at any time after the right has accrued, upon three days notice, as provided in Sections 1161 and 1162, CODE OF CIVIL PROCEDURE.

Reëntry, when and how to be made.

792. Summary proceedings for obtaining possession of real property forcibly entered, or forcibly and unlawfully detained, are provided for in Sections 1159 to 1175, both inclusive, of the CODE OF CIVIL PROCEDURE.

Summary proceedings in certain cases provided for.

793. An action for the possession of real property leased or granted, with a right of reëntry, may be maintained at any time, in the District Court, after the right to reënter has accrued, without the notice prescribed in Section 791.

Notice not necessary before action.

CHAPTER III.

SERVITUDES.

SECTION 801. Servitudes attached to land.

802. Servitudes not attached to land.

803. Designation of estates.

804. By whom grantable.

805. By whom held.

806. Extent of servitudes.

807. Apportioning easements.

808. Rights of owner of future estate.

809. Actions by owner and occupant of dominant tenement.

810. Actions by owner of servient tenement.

811. How extinguished.

Servitudes
attached
to land.

801. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
9. The right of receiving water from or discharging the same upon land;
10. The right of flooding land;
11. The right of having water flow without diminution or disturbance of any kind;
12. The right of using a wall as a party wall;
13. The right of receiving more than natural support from adjacent land or things affixed thereto;
14. The right of having the whole of a division fence maintained by a coterminous owner;
15. The right of having public conveyances stopped, or of stopping the same on land;

16. The right of a seat in church;
17. The right of burial.

NOTE.—An easement is a privilege that one neighbor hath of another by grant or prescription without profit; and as described in a modern treatise, it is “a privilege without profit which the owner of one neighboring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner.”—Gale & Whately's *Law of Easements*, p. 5. The essential qualities of easements are these: 1. They are incorporeal; 2. They are imposed upon corporeal property; 3. They confer no right to a participation in the profits arising from such property; 4. They are imposed for the benefit of corporeal property; and, 5. There must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests.—*Wolfe vs. Frost*, 4 Sand. Ch., p. 89; Gale & Whately on *Easements*, p. 5; Washburn on *Easements*, p. 3.

RIGHT OF PASTURE.—If the grantor of lands reserves in the grant the “grass, herbage, feeding, and pasturage,” he and all persons representing him may enter with their cattle and depasture the land, as a servitude or easement created by the acceptance of a deed containing such a reservation.—*Rose vs. Bunn*, 21 N. Y., p. 275; Washburn on *Easements*, p. 511.

RIGHT OF FISHING.—Washburn on *Easements*, p. 410; *Carter vs. Murcot*, 4 Burr, p. 2165; *Day vs. Day*, 4 Md., p. 262; *Gould vs. James*, 6 Cow., p. 369; *Chalker vs. Dickinson*, 1 Conn., p. 382; *Collins vs. Benbury*, 5 Ired., p. 118.

RIGHT OF TAKING GAME.—*Wickham vs. Hawker*, 7 Mees. and W., p. 63; Washburn on *Easements*, p. 81.

RIGHT OF WAY.—It is a general rule that upon a conveyance of land, whatever is in use for it as an incident or appurtenance passes with it. The law gives such a construction to the conveyance in view of what is thus used for the land as an incident or appurtenance. Whether a right of way or other easement is embraced in a deed is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance.—*Huttemeir vs. Albro*, 18 N. Y., p. 49. The intention of the parties is to be learned from those facts.—4 Kent's *Comm.*, p. 467; *United*

States vs. Appleton, 1 Sumn., p. 492; N. Ins. Fac. vs. Batchelder, 3 N. H., p. 190; Pyer vs. Carter, 40 Eng. L. and Eq., p. 413. A way of necessity is created over the land of the grantor when he conveys a piece of land wholly surrounded by the grantor's other land, or by the land of the grantor and that of a stranger.—Collins vs. Prentice, 15 Conn., p. 39; Brice vs. Randall, 7 Gill and J., p. 349; Kimball vs. Cocheco R. R., 7 Fost, p. 449; Marshall vs. Trumbull, 28 Conn., p. 183; N. Y. Life Ins. and Trust Co. vs. Milnor, 1 Barb. Ch., p. 353; Lawton vs. Rivers, 2 McCord, p. 445; Wissler vs. Hershey, 23 Penn. St., p. 333; Nichols vs. Luce, 24 Pick., p. 102. The right of way from necessity over the land of another is always of strict necessity, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way from necessity over the land of another can exist. That a person claiming a way of necessity has already one way is a good plea, and bars the plaintiff.—McDonald vs. Lindall, 3 Rawle, p. 492; Leonard vs. Leonard, 2 Allen, p. 543; Ogden vs. Grove, 38 Penn. St., p. 487; Trask vs. Patterson, 29 Me., p. 499; Hale vs. M'Leod, 2 Metc. (Ky.), p. 98. Where the grantor conveys land surrounding a parcel retained by him, he has a way of necessity over the granted land.—Brigham vs. Smith, 4 Gray, p. 297; Clark vs. Eogge, Cro. Jac., p. 170; Washburn on Easements, p. 164. If a way for the benefit of the parcel conveyed existed before the conveyance, the same must be continued, if reasonably convenient.—Pennington vs. Galland, 9 Exch., p. 1. If it is to be designated anew, the right of selection as to place lies with the owner of the land over which it is to pass.—Russel vs. Jackson, 2 Pick., p. 574; Capers vs. Wilson, 3 McCord, p. 170; Holmes vs. Seely, 19 Wend., p. 507; Smiles vs. Hastings, 24 Barb., p. 44. But if the owner fail, upon request, to designate such way, the party having the right to it may make the selection, having due regard to the interests of the owner.—Holmes vs. Seely, 19 Wend., p. 507; Morris vs. Edgington, 3 Taunt., p. 23; Nichols vs. Luce, 24 Pick., p. 102. As to way of necessity, see Esmond vs. Chew, 15 Cal., p. 137.

RIGHT OF TAKING WATER.—Race vs. Ward, 4 El. & Bl., p. 702; Manning vs. Wasdale, 5 Ad. & El., p. 758; Weekly vs. Wildman, 1 Ld. Raymond, p. 407.

RIGHT OF TAKING MINERALS, ETC.—One may have an easement to dig and carry away ore in tract of land.—*Arnold vs. Stevens*, 24 Pick., p. 109; to take seaweed—*Phillips vs. Rhodes*, 7 Met., p. 322; to dig stones—*Worcester vs. Green*, 2 Pick., p. 425; *Green vs. Putnam*, 8 Cush., p. 222.

RIGHT OF TRANSACTING BUSINESS UPON LAND. *Tyson vs. Smith*, 9 Ad. & El., p. 406; 6 id., p. 745. One may have an easement to hang clothes in another's yard.—*Drewell vs. Towler*, 2 Barn. & Ad., p. 735.

RIGHT OF FLOODING LAND.—*Tabor vs. Bradley*, 18 N. Y., p. 109; *Le Ray vs. Platt*, 4 Paige, p. 77; 4 Kent's Com., p. 517; *Kent vs. Waite*, 10 Pick., p. 138; *Kieffer vs. Imhoff*, 26 Penn., p. 438; *Oakley vs. Stanley*, 5 Wend., p. 523.

RIGHT OF HAVING WATER FLOW WITHOUT DIMINUTION.—Every person through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land on the same watercourse, either above or below, has a right, unreasonably, to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it.—*Johnson vs. Jordan*, 2 Met., p. 234. This right, though coming under the head of what is called a "natural easement," is not, however, the result of a grant, or of prescription, but it is a right *jure naturæ*—it is an incident of property in the land, not an appurtenance to it.—*Tyler vs. Wilkinson*, 4 Mason, p. 397; *Gardner vs. Trustees of Newburgh*, 2 Johns. Ch., p. 162; *Elliot vs. Fitchburg R. R. Co.*, 10 Cush., p. 191; *Parker vs. Foote*, 19 Wend., p. 309; *Davis vs. Fuller*, 12 Vt., p. 178; *Wadsworth vs. Tillitson*, 15 Conn., p. 366; *McCoy vs. Danley*, 20 Penn. St., p. 85; *Blanchard vs. Baker*, 8 Me., p. 253.

RIGHT OF RECEIVING WATER FROM OR DISCHARGING IT UPON LAND.—Water is descendible by nature; therefore the owner of a dominant or superior hentage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior. This obligation applies only to waters which flow naturally without the art of man. Those which come from springs, or from rain falling directly on the hentage, or even by the natural disposition of the place, are the only ones to which this expression of the law can be applied. Hence the owner of a mill has an easement in the land

below for the free passage of the water from the mill in the natural channel of the stream.—*Kauffman vs. Guesemer*, 26 Penn. St., p. 407; *Washburn on Easements*, p. 226.

PARTY WALLS.—*Washburn on Easements*, p. 454; 2 *Washburn on Real Property*, p. 78; 3 *Kent Com.*, p. 437; *Sherred vs. Cisco*, 4 Sandf., p. 480; *Eno vs. Del Vecchio*, 4 Duer, p. 53; 6 Duer, p. 17. Bouvier defines it to be: "A wall erected on the line between two adjoining estates belonging to different persons, for the use of both estates."—2 *Bouvier Inst.*, n. 1615. Each owner has a right to place joists in it and use it for the support of his roof.—4 Sandf., p. 480; 20 *Mo.*, p. 69; 12 *La. An.*, p. 785. When a party wall exists and one of the owners desires a deeper foundation, he may undermine the wall, using due care to prevent an injury to his neighbor; and having done so, is not answerable for any consequential damages which may ensue.—17 *John.*, p. 92; 12 *Mass.*, p. 220; 2 *N. H.*, p. 534; 15 *N. Y.*, p. 601.

THE RIGHT OF RECEIVING MORE THAN NATURAL SUPPORT.—It is a well settled rule of the common law that the owner of land has a natural right to the use of the same in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and the owners of such adjacent lots have no right to destroy his land by removing these natural supports or barriers.—3 *Barn. & Adolph.*, p. 871; *Thurston vs. Hancock*, 12 *Mass.*, p. 223; *Panton vs. Holland*, 17 *John.*, p. 92. It follows from the rule above stated, that if a person in the exercise of ordinary care and skill in making an excavation for the improvement of his own lot digs so near the foundation of a house on an adjacent lot as to cause it to crack and settle, he will not be liable for such injury if such excavation would not have injured the adjacent lot in its natural state.—17 *John.*, p. 92; 12 *Mass.*, p. 223. But it seems that the party who is about to endanger the building of his neighbor ought to give him reasonable notice, so that the neighbor may protect his building.—*Peyton vs. Mayor of London*, 9 *Barn. & Cress.*, p. 725; *Walters vs. Pfeil*, 1 *Moody & Malk.*, p. 362; *Massey vs. Goyder*, 4 *Car. & Payne*, p. 161. But there is a class of cases where the owner of a building on the adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved thereby, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient founda-

tions, and which by prescription are entitled to special privileges. And, also, those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title.—*Lasala vs. Holbrook*, 4 Paige Ch., p. 173; *Palmer vs. Fleshees*, 1 Sid., p. 167; *Cox vs. Mathews*, 1 Vent., p. 237; *Story vs. Oden*, 12 Mass., p. 157; *Partridge vs. Gilbert*, 15 N. Y., p. 601; *Keleltas vs. Penfold*, 4 E. D. Smith, p. 122; *Eno vs. Del Vecchio*, 3 Duer, p. 53.

RIGHT TO HAVE DIVISION FENCES MAINTAINED. There may be a valid prescription by which the owner of land may become bound to maintain perpetually the whole of the division fence between himself and the adjoining proprietor.—*Adams vs. Van Alstyne*, 25 N. Y., p. 235; *Burney vs. Proprietors, etc.*, in Hull, 5 Pick., p. 503; *Starr vs. Rokesby*, 1 Salk., p. 335. When such prescription is established, it fastens itself upon the land charged with the burden, and every part of the servient tenement is as much bound as the whole of the original premises were, and every part of the dominant tenement is entitled to claim the benefit of the charge against the premises bound.—*Hills vs. Miller*, 3 Paige, p. 254; *Child vs. Chappell*, 5 Selden, p. 246; *Adams vs. Van Alstyne*, 25 N. Y., p. 235; 6 Mass., p. 90; 2 Me., p. 72; 5 Pick., p. 503.

THE RIGHT OF HAVING PUBLIC CONVEYANCES STOPPED.—An agreement made with a railroad company with a person owning land adjacent to its track, to establish and maintain a permanent turnout track and stopping place at a particular point, and to stop there, is in substance the grant of an easement or servitude binding upon the property of the company as the servient tenement, for the benefit of the adjacent owner and of all those who shall succeed him in his estate as owners thereof.—*Pitkin vs. L. Island R. R. Co.*, 2 Barb. Ch., p. 221; *Day vs. N. Y. Cent. R. R.*, 31 Barb., p. 548.

RIGHT OF A SEAT IN CHURCH.—*Lonsley vs. Hayward*, 1 Yon. & J., p. 583; *Mainwaring vs. Giles*, 5 B. & Ald., p. 356. In New York it has been held that though as matter of fact pews were not held as easements, yet they might be so held.—*Shaw vs. Beveridge*, 3 Hill, p. 26.

RIGHT OF BURIAL.—*Washburn on Easements*, p. 515; *Gay vs. Baker*, 17 Mass., p. 485; *Richards vs. Dutch Church*, 32 Barb., p. 42; *Daniel vs. Wood*, 1 Pick., p. 102.

Servitudes
not
attached to
land.

am. 802. The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:

1. The right of fishing and taking game;
2. The right of a seat in church;
3. The right of burial;
4. The right of taking rents and tolls;
5. The right of way.

NOTE.—A servitude, is defined to be a right whereby one thing is subject to another thing, *or person*, for use or convenience, contrary to the common right.—Ayl. Pand., p. 306; Ersk. Inst., p. 354. Servitudes which affect land are divided into two kinds, real and personal. The servitudes enumerated in Section 801 are real servitudes, imposed for the benefit of the estate to which the right belongs, and resting upon the estate on which the obligation is imposed. The servitudes enumerated in Section 802 are personal; they are not attached to a dominant estate, but to the person for whose benefit they are imposed. Though the terms easements and servitudes are often used by common law writers indiscriminately, it will be seen from the definitions given that a servitude may exist, and yet two elements necessary to constitute an easement be wanting, viz: 1. Benefit to corporeal property; and 2. The dominant estate. Servitudes in which these elements are wanting are classed by the common law writers under the head of rights in gross.—Washburn on Easements, p. 8; Burton on Real Property, Section 1116.

RIGHTS OF FISHERY.—Washburn on Easements, p. 410.

RIGHT OF A SEAT IN CHURCH.—McNabb vs. Pond, 4 Bradf., p. 7; Voorhees vs. Presb. Ch., 17 Barb., p. 103; Matter of Ref. Dutch Ch., 16 Barb., p. 237; First Bap. Ch. vs. Witherell, 3 Paige, p. 296.

RIGHT OF BURIAL.—Richards vs. Northwest Dutch Ch., 11 Abbott's Pr., p. 30.

RIGHT OF WAY.—Ackroyd vs. Smith, 10 C. B., p. 164.

Personal servitudes are not assignable.—Washburn on Easements, pp. 4-10; Burton on Real Property, Sec. 1116; Ackroyd vs. Smith, 10 C. B., p. 164; Garrison vs. Rudd, 19 Ill., p. 558.

803. The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Designation of estates.

NOTE.—Washburn on Easements, p. 5; Wolfe vs. Frost, 4 Sandf. Ch., p. 72.

804. A servitude can be created only by one who has a vested estate in the servient tenement.

By whom grantable.

NOTE.—Earl of Portmore vs. Bunn, 3 Dowl. & Ry., p. 145.

805. A servitude thereon cannot be held by the owner of the servient tenement.

By whom held.

NOTE.—Huttemeier vs. Albro, 2 Bosw., p. 556; 18 N. Y., p. 48; Tabor vs. Bradley, 18 N. Y., p. 109; James vs. Plant, 4 Ad. & El., p. 749.

806. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

Extent of servitudes.

NOTE.—Dixon vs. Clow, 24 Wend., p. 188; Corning vs. Gould, 16 Wend., p. 531. If a grant be of a way from a highway to the grantee's dwelling house, he may not open it to his field. And if the way be to a particular corner of a field, the grantee may not use it to enter his field at any other point.—Henning vs. Burnett, 8 Exch., p. 187. Where a way is claimed by prescription, the character and extent of it is fixed by the uses under which it is gained.—Ballard vs. Dyson, 1 Taut., p. 279; Allen vs. Gomme, 11 A. & E., p. 759. In Lewis vs. Carstairs, 6 Wharton, p. 193, the Court limited the use of a way created for the accommodation of certain lots to these lots, and excluded its use for any other purposes. If one acquires a right of way to one lot or parcel of land, he cannot use it to gain access first to that parcel and thence over his own land to other lands belonging to him. So far as he should use it for access to or accommodation of other parcels than the specific one to which it was appurtenant, he would be a trespasser.—Lawton vs. Ward, 1 Ld. Raymond, p. 75; Jamison vs. McReady, 5 W. & S., p. 128; French vs. Martin, 4 Fost., p. 440; Kirkham vs. Sharp, 1 Wharton, p. 323; Davenport vs. Lamson, 21 Pick., p. 72; Case of a Private Road, 1 Ash., p. 424; Washburn on Easements, p. 87. The use of an easement by

prescription limits and defines the extent of the right.—Washburn on Easements, p. 352. And the nature of the use cannot be changed from that by which the prescription was gained.—Washburn on Easements, p. 147.

Apportion-
ing
easements.

807. In case of partition of the dominant tenement the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

NOTE.—If the dominant estate is divided, the easement will enure to the benefit of the owner of any part of it.—Washburn on Easements, p. 58; 2 Washburn on Real Property, p. 32; 3 Kent Com., p. 420; Barron vs. Richard, 8 Paige, p. 351; Hills vs. Miller, 3 Paige, p. 254. Provided, however, that no additional burden is cast upon the servient estate.—Whitney vs. Lee, 1 Allen, p. 198; Underwood vs. Carney, 1 Cush., p. 285; Watson vs. Bioren, 1 Serg. & R., p. 227; Codling vs. Johnson, 9 Barnew. & C., p. 933; Staple vs. Heydon, 6 Mod., p. 1.

Rights of
owner of
future
estate.

808. The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

NOTE.—Proud vs. Hollis, 1 Barn. and Cr., p. 8.

Actions by
owner and
occupant of
dominant
tenement.

809. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

NOTE.—Brouwer vs. Jones, 23 Barb., p. 153.

Actions by
owner of
servient
tenement.

810. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

NOTE.—Carpenter vs. Oswego and Syr. R. R., 24 N. Y., p. 655; Wager vs. Troy Union R. R., 25 N. Y., p. 526. But to the contrary is Redfield vs. Utica and Syracuse R. R. Co., 25 Barb., p. 54, approved in Wilklow vs. Lane, 37 Barb., p. 244.

811. A servitude is extinguished :

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person; How extinguished.
2. By the destruction of the servient tenement;
3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

NOTE.—To the existence of every *real* servitude the existence of two distinct and separate estates is necessary—the dominant, in favor of which it exists, and the servient, upon which it is exercised. If at any time these estates are united under one ownership and possession, it follows that one of the elements necessary to the existence of the servitude is wanting, and that it is at once extinguished.—Tudor's Leading Cases, p. 108. But, to work this result, there must be an absolute unity of title and possession.—Ritger vs. Parker, 8 Cush., p. 145; Tyler vs. Hammond, 11 Pick., p. 193; Hazard vs. Robinson, 3 Mason, p. 272; Kieffer vs. Imhoff, 26 Penn. St., p. 438; Gayetty vs. Bethune, 14 Mass., p. 53; Hancock vs. Wentworth, 5 Met., p. 446. The destruction of the servient tenement extinguishes the easement.—Voorhees vs. Presbyterian Church, 17 Barb., p. 109; Regina vs. Bamber, 5 Q. B., p. 279; Regina vs. Chorley, 12 Q. B., p. 515. As to what acts of the owner of the servitude will extinguish it, see Washburn on Easements, p. 536; Corning vs. Gould, 16 Wend., p. 539; 3 Kent. Comm., p. 449; Crain vs. Fox, 16 Barb., p. 184. A servitude created by deed is not extinguished by mere non-user for any period.—Smyles vs. Hastings, 22 N. Y., p. 217; 24 Barb., p. 44. But a use by the owner of the premises over which the servitude was granted, adverse to the enjoyment of the easement for a time long enough to create a prescriptive right will extinguish the servitude.—Arnold vs. Stevens, 24 Pick., p. 106; Jewett vs. Jewett, 16 Barb., p. 150; French vs. Braintree Co., 23 Pick., p. 222; Farrar vs. Cooper, 34 Me., p. 394; 3 Kent's Com., p. 359; Angell on Watercourses, Sec.

252. If the servitude was acquired by enjoyment, it may be extinguished by non-user for a period corresponding with the Statute of Limitations applicable to real property.—*Robie vs. Sedgwick*, 35 Barb., p. 329.

TITLE III.

RIGHTS AND OBLIGATIONS OF OWNERS.

CHAPTER I. *Rights of Owners.*

II. *Obligations of Owners.*

CHAPTER I.

RIGHTS OF OWNERS.

ARTICLE I. INCIDENTS OF OWNERSHIP.

II. BOUNDARIES.

ARTICLE I.

INCIDENTS OF OWNERSHIP.

SECTION 818. Rights of tenant for life.

819. Rights of tenant for years, etc.

820. Same.

821. Rights of grantees of rents and reversion.

822. Liability of assigns of lessee.

823. Rights of lessees and their assignees, etc.

824. Remedy on leases for life.

825. Rent dependent on life.

826. Remedy of reversioners, etc.

Rights of
tenant for
life.

818. The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

NOTE.—*Jackson vs. Brownson*, 7 Johns., p. 227; *Bradstreet vs. Pratt*, 17 Wend., p. 44; *Livingston vs. Reynolds*, 2 Hill, p. 157; 26 Wend., p. 115.

819. A tenant for years or at will, unless he is a wrong-doer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy.

Rights of tenant for years, etc.

NOTE.—Freer vs. Stotenbur, 36 Barb., p. 641.

820. A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section.

Same.

821. A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had.

Rights of grantees of rents and reversion.

NOTE.—The person.—Childs vs. Clark, 3 Barb. Ch., p. 58. To whom transferred or devised.—Van Rensselaer vs. Hays, 19 N. Y., p. 68. Or rent transferred.—Williard vs. Tillman, 2 Hill, p. 274; Moffat vs. Smith, 4 N. Y., p. 126. In Reay vs. Cotter, 29 Cal., p. 168, it was held that the right to remove a tenant under the Act then in force relating to forcible entries and unlawful detainers was given to the conventional landlord alone, and not to his successor in the estate.

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822. Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assigns of the lessee.

Liability of assigns of lessee.

823. Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns,

Rights of lessees and their assigns, etc.

except upon covenants against incumbrances or relating to the title or possession of the premises.

NOTE.—Day vs. Swackhamer, 2 Hilton, p. 4.

Remedy
on leases
for life.

824. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

Rent
dependent
on life.

825. Rent dependent on the life of a person may be recovered after as well as before his death.

Remedy of
reversion-
ers, etc.

826. A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

NOTE.—Van Deusen vs. Young, 29 Barb., p. 9; Robinson vs. Wheeler, 25 N. Y., p. 252.

827 added

ARTICLE II.

BOUNDARIES.

SECTION 829. Rights of owner.

830. Boundaries by water.

831. Boundaries by ways.

832. Lateral and subjacent support.

833. Trees whose trunks are wholly on land of one.

834. Line trees.

Rights of
owner.

829. The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

NOTE.—The term "land" comprehends any ground, soil, or earth, as meadows, woods, waters, pastures, marshes, furze, and heath. It has an indefinite extent upwards as well as downwards, and includes all houses and other buildings, standing or built, upon it, and whatever is in a direct line between the surface and the center of the earth.—2 Bl. Com., p. 18; 1 Cruise on Real Property, p. 58.

Am

830. When land borders upon tide water, or upon water which constitutes an exterior boundary of the

State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

Boundaries
by water.

NOTE.—Land bordering upon tide water.—Gould vs. Hudson River R. R., 6 N. Y., p. 522. Upon water which constitutes the exterior boundary of a State.—Kingman vs. Sparrow, 12 Barb., p. 206; Canal Appraisers vs. People, 17 Wend., p. 570. Upon a tideless lake.—Champlain R. R. Co. vs. Valentine, 19 Barb., p. 484. Upon other waters.—Ledyard vs. Ten Eyck, 36 Barb., p. 102; Hooker vs. Cummings, 20 Johns., p. 90; Canal Commissioners vs. Kempshall, 26 Wend., p. 404. In Hicks vs. Coleman, 25 Cal., p. 122, it was held that where a river is named as the boundary line of a tract of land, the boundary line follows the meanderings of the stream, and that where this boundary line is to run along a stream not navigable a given distance, the meanderings of the stream are to be followed until the required distance when reduced to a straight line is attained. The doctrine of Hicks vs. Coleman is affirmed in Fratt vs. Woodward, 32 Cal., p. 226.

831. An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.

Boundaries
by ways.

NOTE.—Kittle vs. Pfeiffer, 20 Cal., p. 484; Mott vs. Mayor of N. Y., 2 Hilton, p. 358; Bissell vs. N. Y. Central R. R., 23 N. Y., p. 61; Wager vs. Troy Union R. R., 25 N. Y., p. 529.

See 832. Each coterminal owner is entitled to the lateral and subjacent support which his land by nature receives from the land of the other.

Lateral
and sub-
jacent
support.

NOTE.—Lateral support.—Farrand vs. Marshall, 21 Barb., pp. 409-421; Radcliff vs. Brooklyn, 4 N. Y., p. 195; Panton vs. Holland, 17 Johns., p. 92; Lasala vs. Holbrook, 4 Paige, p. 169. Subjacent support.—Rowbotham vs. Wilson, 8 El. B. & Bl., p. 123; Bonomi vs. Backhouse, El. B. & Bl., p. 622; 7 Jurist. (N. S.), p. 809, affd.; 9 H. L. Cas., p. 503.

Certain
trusts
unaffected.

any Trustee in a trust, where the title of such Trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

NOTE.—Frazer vs. Western, 1 Barb. Ch., p. 238.

Rep
Trustees of
estate for
use of
another
take no
interest.

850. Every disposition of real property, whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to any person, to the use of or in trust for another, no estate or interest vests in the Trustee; but he must execute a release of the property to the beneficiary on demand, the latter paying the expense thereof.

NOTE.—The transfer must be made directly.—Hotchkiss vs. Elting, 36 Barb., p. 44. If not so made, no estate vests in the Trustee.—Ring vs. McCoun, 10 N. Y., p. 268; Rawson vs. Lampman, 5 N. Y., p. 456; Wright vs. Douglass, 7 N. Y., p. 564. The provision that a release must be executed is new (Ring vs. McCoun, 10 N. Y., p. 268), but is desirable in order to avoid difficulties in titles.

• *Rep*
Preceding
sections
qualified.

851. The preceding sections of this Title do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined.

Trust must
be in
writing.

852. No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the Trustee, or by his agent thereto authorized by writing;
2. By the instrument under which the Trustee claims the estate affected; or,
3. By operation of law.

NOTE.—See Code of Civil Procedure, Sections 1971, 1972.

Am

853. Where a transfer of real property is made to one person, and the consideration therefor is paid by

or for another, no use or trust results in favor of the person by or for whom such payment is made; ~~but the title vests in the grantee, subject only to the provisions of the next two sections.~~ Transfer to one for money paid by another.

NOTE.—Davis vs. Graves, 29 Barb., p. 480. The words "or for" are intended to supersede the doctrine of Sieman vs. Austin, 33 Barb., p. 17—a decision which leaves much room for the frauds which this section is meant to avoid.

Ref
854. Every such transfer as is described in the last section is presumed to be fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust results in favor of such creditors to the extent necessary to satisfy their just demands. Rights of creditors.

NOTE.—Presumption of fraud.—Wood vs. Robinson, 22 N. Y., p. 564; Brewster vs. Power, 10 Paige, p. 568. Resulting trust.—Garfield vs. Hatmaker, 15 N. Y., p. 475; Wood vs. Robinson, 22 N. Y., p. 564; McCartney vs. Bostwick, 31 Barb., p. 390.

Ref
855. Section 853 does not apply:

1. To cases where the grantee took the grant as an absolute transfer in his own name, without the consent or knowledge of the person paying the consideration; nor, Section 853 qualified.

2. To cases where the grantee, in violation of a trust, purchased the real property so transferred with property belonging to another person.

NOTE.—If land is purchased in the name of one person, and the consideration is paid by another, a trust rises, and the person in whose name the conveyance is taken holds as trustee for the one furnishing the money.—Osborne vs. Endicott, 6 Cal., p. 149; Hidden vs. Jordan, 21 Cal., p. 92; Bayles vs. Baxter, 22 Cal., p. 575; Simson vs. Eckstein, 22 Cal., p. 580; Millard vs. Hathaway, 27 Cal., p. 119; Currey vs. Alvarado, 34 Cal., p. 254; Jenkins vs. Frink, 30 Cal., p. 586. The facts out of which the trust arises may be proved by parol.—Osborne vs. Endicott, 6 Cal., p. 149; Bayles vs.

Baxter, 22 Cal., p. 575. But the proof must be clear.—
Millard vs. Hathaway, 27 Cal., p. 119. Patentee as
Trustee.—Wilson vs. Castro, 31 Cal., p. 420; Bludworth
vs. Lake, 33 Cal., p. 256.

Purchasers
protected.

856. No implied or resulting trust can prejudice
the rights of a purchaser or encumbrancer of real
property for value and without notice of the trust.

NOTE.—Wood vs. Robinson, 22 N. Y., p. 564; Sie-
man vs. Austin, 33 Barb., p. 14.

For what
purposes
express
trusts may
be created.

Amu

857. Express trusts may be created for any of the
following purposes:

1. To sell real property for the benefit of creditors;
2. To sell, mortgage, or lease real property for the
benefit of annuitants or other legatees, or for the pur-
pose of satisfying any charge thereon;
3. To receive the rents and profits of real property,
and pay them to or apply them to the use of any per-
son, whether ascertained at the time of the creation of
the trust or not, for himself or for his family during the
life of such person, or for any shorter term, subject to
the rules of Title II of this Part; or,
4. To receive the rents and profits of real property,
and to accumulate the same for the purposes and within
the limits prescribed by the same Title.

NOTE.—Express trusts for the sale of real property
for the benefit of creditors.—Rogers vs. Tilley, 20 Barb.,
pp. 641, 642; Darling vs. Rogers, 22 Wend., p. 483; Van
Nest vs. Yoe, 1 Sandf. Ch., p. 4; Planck vs. Schermer-
horn, 3 Barb. Ch., p. 644. The words "annuitants or
other," in the second subdivision, are new, but supported
by Lang vs. Ropke, 5 Sandf., p. 371; Hawley vs. James,
16 Wend., pp. 61, 117. The words "pay them to or,"
in the third subdivision, are new, but supported by
Leggett vs. Perkins, 2 N. Y., pp. 297, 306, 309; Leg-
gett vs. Hunter, 19 N. Y., p. 454; Noyes vs. Blake-
man, 6 N. Y., p. 581. The words "whether ascer-
tained at the time of the trust or not," in the
third subdivision, are new, but conform to Gilman
vs. Reddington, 24 N. Y., pp. 13, 14. The words
"for himself or for his family," in the same subdi-
vision, are also new, but are sustained by Rogers vs.

Tilley, 20 Barb., pp. 639, 641. Though a trust for the minority of the beneficiary is valid (*Lang vs. Ropke*, 5 Sandf., p. 369), it is so upon the ground that it terminates at his death, even while yet a minor.—*Id.*, *Hawley vs. James*, 16 Wend., p. 61; 5 Paige, p. 463. During the life of such person.—*Downing vs. Marshall*, 23 N. Y., p. 377; *Gilman vs. Reddington*, 24 N. Y., p. 12; 1 Hilt., p. 492. For a shorter term.—*Coster vs. Lorillard*, 14 Wend., p. 318; *Hawley vs. James*, 16 id., pp. 174, 265.

Rep. Sub.

858. A devise of real property to executors or other Trustees, to be sold or mortgaged, where the Trustees are not also empowered to receive the rents and profits, vests no estate in them; but the trust is valid as a power in trust.

Certain
devises in
trust to be
deemed
powers.

NOTE.—*Hawley vs. James*, 16 Wend., p. 114; *Darling vs. Rogers*, 22 Wend., p. 492; *Germond vs. Jones*, 2 Hill, p. 573; *Campbell vs. Johnson*, 1 Sandf. Ch., p. 148.

859. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

Profits of
land liable
to creditors
in certain
cases.

NOTE.—*Sellick vs. Mason*, 2 Bart. Ch., p. 79; *Clute vs. Blood*, 8 Paige, p. 83; *L'Amoureux vs. Van Rensselaer*, 1 Barb. Ch., p. 84; *Noyes vs. Blakeman*, 6 N. Y., p. 567.

Rep. Sub.

860. Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the Trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust,

Other
express
trusts to be
powers in
trust.

subject to the provisions in relation to such powers contained in Title V of this Part.

NOTE.—*Darling vs. Rogers*, 22 Wend., p. 494; *Hotchkiss vs. Elting*, 36 Barb., p. 45.

Creation of
certain
powers not
prohibited.

Reh 861. Nothing in this Title prevents the creation of a power in trust for any of the purposes for which an express trust may be created.

NOTE.—Under a New York statute similar to this Chapter, but which contained no provision corresponding with Section 861, the contrary was assumed by *Bronson, J.*, in *Hawley vs. James*, 16 Wend., pp. 174, 175, followed in *Arnold vs. Gilbert*, 3 Sandf. Ch., p. 563. This section enacts the construction adopted expressly by *Duer, J.*, in *Lang vs. Ropke*, 5 Sandf., pp. 367, 372, 373, and by implication in *Tucker vs. Tucker*, 5 N. Y., p. 408, and *Downing vs. Marshall*, 23 N. Y., p. 380.

And land,
etc., to
descend to
persons
entitled.

Reh 862. In every case where a trust is valid as a power in trust, the real property to which the trust relates remains in, or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust.

Trustees of
express
trusts to
have whole
estate.

863. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the Trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

NOTE.—*Briggs vs. Davis*, 21 N. Y., p. 576; *Savage vs. Burnham*, 17 N. Y., p. 569; *Noyes vs. Blakeman*, 6 N. Y., pp. 578–581; *Coster vs. Lorillard*, 14 Wend., p. 304.

Author of
trust may
devise, etc.

864. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or

termination of the trust, and may transfer or devise such property, subject to the execution of the trust.

NOTE.—Corse vs. Leggett, 25 Barb., p. 395.

865. The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the Trustees and those lawfully claiming under them.

Title of grantor of trust property.

866. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors.

Interests remaining in grantor of express trust.

Ann 867. The beneficiary of a trust for the receipt of the rents and profits of real property cannot transfer or in any manner dispose of his interest in such trust.

Powers over trust of party interested.

NOTE.—Belmont vs. O'Brien, 12 N. Y., p. 402.

Rev 868. The beneficiary of a trust for the payment of an annuity out of the rents and profits of real property, or of a sum in gross, can dispose of his interest in such trust.

Same.

NOTE.—Founded upon Revised Statutes of New York, Section 63, modified, so as to adopt the construction given to this section of the Revised Statutes in Hawley vs. James, 16 Wend., pp. 61, 275 (decree, Section 4), and followed in Lang vs. Ropke, 5 Sandf., p. 371; Griffen vs. Ford, 1 Bosw., p. 143. To the contrary, see McSorley vs. Wilson, 4 Sandf. Ch., p. 524; Clute vs. Bool, 8 Paige, p. 86.

Ann 869. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the Trustee, such grant must be deemed absolute in favor of the subsequent creditors of the Trustees, not having notice of the trust, and in favor of purchasers from such Trustees without notice, and for a valuable consideration.

Effect of omitting trust in conveyance

NOTE.—Davis vs. Graves, 29 Barb., p. 480.

Annulled

Certain
sales, etc.,
by Trustees,
void.

870. Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the Trustees, in contravention of the trust, is absolutely void.

NOTE.—Belmont vs. O'Brien, 12 N. Y., p. 394-405; Briggs vs. Davis, 20 N. Y., p. 21; 21 N. Y., p. 577. This rule applies to purchasers in good faith, as well as to any others.

When
estate of
Trustee to
cease.

871. When the purpose for which an express trust was created ceases, the estate of the Trustee also ceases.

TITLE V.

POWERS.

SECTION 878. What powers exist.

- 879. Application of this Title.
- 880. Definition of a power.
- 881. Terms "author of a power" and "holder of a power" defined.
- 882. Division of powers.
- 883. Definition of general powers.
- 884. Definition of special powers.
- 885. Beneficial powers.
- 886. Powers in trust.
- 887. General powers, when in trust.
- 888. Special powers, when in trust.
- 889. Who may create power.
- 890. To whom power may be given.
- 891. How created.
- 892. Reservation of powers in conveyances.
- 893. When power irrevocable.
- 894. When power a lien.
- 895. Power of sale in mortgage.
- 896. Who to execute powers.
- 897. Married women.
- 898. Same.
- 899. How executed.
- 900. Execution by survivors.
- 901. Execution of power to dispose by devise.
- 902. Execution of power to dispose by grant.
- 903. Directions by author, when disregarded.

SECTION 904. Same.

- 905. Nominal conditions.
- 906. When directions of author to be observed.
- 907. Consent of third person to execution of power.
- 908. Same.
- 909. Omission to recite power.
- 910. Instruments deemed conveyances.
- 911. Certain dispositions not void.
- 912. Computation of term of suspension
- 913. What estate may be given.
- 914. Married women, their authority.
- 915. Defective execution.
- 916. Fraud.
- 917. General and beneficial powers to married women.
- 918. Estate of owner for life, etc., when changed into a fee.
- 919. Certain powers create a fee.
- 920. Same.
- 921. Effect of power to devise inheritance in certain cases.
- 922. Power to dispose of fee.
- 923. Power to revoke.
- 924. Special and beneficial powers, who may take.
- 925. Construction of leasing powers.
- 926. Power to make leases by owner for life.
- 927. Release of such power.
- 928. Mortgages by party having power to lease, etc.
- 929. Effect thereof.
- 930. Special and beneficial powers liable to creditors.
- 931. Future beneficial powers.
- 932. Trust powers imperative.
- 933. Effect of right of selection.
- 934. Construction of certain powers.
- 935. Same.
- 936. When Court to execute power.
- 937. Same.
- 938. Execution of trust power when compelled by creditors,
etc.
- 939. Defective execution.
- 940. Application of certain sections.

Reh 878. Powers, in relation to real property, are those only which are specified in this Title. What powers exist

Reh 879. The provisions of this Title do not extend to a simple power of attorney to convey real property in the name of the owner and for his benefit. Application of this Title.

Reh 880. A power, as the term is used in this Title, is

Definition
of a power.

an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose.

NOTE.—Selden vs. Vermilya, 3 N. Y., p. 536; Downing vs. Marshall, 23 N. Y., p. 377; Belmont vs. O'Brien, 12 N. Y., p. 404.

Terms
"author of
a power"
and
"holder of
a power"
defined.

Ref

881. The author of a power, as the term is used in this Title, is the person by whom a power is created, whether by grant or devise; and the holder of a power is the person in whom a power is vested, whether by grant, devise, or reservation.

NOTE.—Barber vs. Cary, 11 N. Y., p. 401.

Division of
powers.

Ref

882. Powers are general or special, and beneficial or in trust.

Definition
of general
powers.

Ref

883. A power is general when it authorizes the alienation or incumbrance of a fee in the property embraced therein by grant, will, or charge, or any of them, in favor of any person whatever.

NOTE.—Tallmadge vs. Sill, 21 Barb., p. 51.

Definition
of special
powers.

Ref

884. A power is special:

1. When a person or class of persons is designated to whom the disposition of property under the power is to be made; or,
2. When it authorizes the alienation or incumbrance, by means of a grant, will, or charge of only an estate less than a fee.

NOTE.—Wright vs. Tallmadge, 15 N. Y., p. 313.

Beneficial
powers.

Ref

885. A power is beneficial when no person other than its holder has, by the terms of its creation, any interest in its execution.

NOTE.—Coster vs. Lorillard, 14 Wend., p. 325; Barber vs. Cary, 11 N. Y., p. 402.

Ref 886. A power is in trust when any person or class of persons, other than its holder, has, by the terms of its creation, an interest in its execution. Powers in trust.

NOTE.—Coster vs. Lorillard, 14 Wend., p. 329.

Ref 887. A general power is in trust when any person or class of persons, other than its holder, is designated as entitled to the proceeds of the disposition or charge authorized by the power, or to any portion of the proceeds or other benefits to result from its execution. General powers, when in trust.

NOTE.—Coster vs. Lorillard, 14 Wend., p. 329.

Ref 888. A special power is in trust:

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons, other than the holder of the power; or,
 2. When any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power.
- Special powers, when in trust.

NOTE.—Wright vs. Tallmadge, 15 N. Y., p. 325;
Coster vs. Lorillard, 14 Wend., p. 325.

Ref 889. No person is capable of creating a power who is not at the same time capable of granting some estate in the property to which the power relates. Who may create power.

NOTE.—Dempsey vs. Tylee, 3 Duer, p. 97.

Ref 890. A power may be vested in any person., To whom power may be given.

NOTE.—Preserving the rule in Sec. 671, ante.

Ref 891. A power may be created only:

1. By a suitable clause, contained in a grant of some estate in the real property to which the power relates, or in an agreement to execute such a grant; or,
 2. By a devise contained in a will.
- How created.

NOTE.—Power is a grant.—Selden vs. Vermilya, 3 N. Y., p. 536. The last clause in Subdivision 1 is founded upon the equitable doctrine that a thing agreed

to be done is to be considered as done.—Waldhams vs. Missionary Society, 12 N. Y., p. 422. In a will.—Dorland vs. Dorland, 2 Barb., p. 80.

Reserva-
tion of
powers in
convey-
ances.

Reh 892. The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power thus reserved is subject to the provisions of this Title in the same manner as if granted to another.

When
power
irrevocable

Reh 893. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is given or reserved in the instrument creating the power.

NOTE.—Wright vs. Delafield, 23 Barb., p. 517.

When
power a
lien.

Reh 894. A power is a lien upon the real property which it embraces, from the time the instrument in which it is contained takes effect; except that against creditors, purchasers, and incumbrancers acquiring their rights in good faith, and without notice from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded.

Power of
sale in
mortgage.

Reh 895. Where a power to sell real property is given to a mortgagee or other incumbrancer in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

Who to
execute
powers.

Reh 896. A power cannot be executed by any person not capable of disposing of real property.

Married
women.

Reh 897. A married woman may execute a power during her marriage, without the concurrence of her husband, unless otherwise prescribed by the terms of the power.

NOTE.—Wright vs. Tallmadge, 15 N. Y., p. 313; Leavitt vs. Pell, 27 Barb., p. 322.

- Reh* 898. No power can be executed by a married woman before she attains her majority, nor without being acknowledged by her in the manner prescribed by the Chapter on Recording Transfers. Same.
- Reh* 899. A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner. How executed.
- Reh* 900. Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power. Execution by survivors.
- Reh* 901. Where a power to dispose of real property is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of the Title on Wills. Execution of power to dispose by devise.
- Reh* 902. Where a power is confined to a disposition by grant, it cannot be executed by will, even though the disposition is not intended to take effect until after the death of the person executing the power. Execution of power to dispose by grant.
- Reh* 903. Where the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this Title. Directions by author, when disregarded.
- Reh* 904. Where the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power. Same.
- Reh* 905. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom or in whose favor they Nominal conditions.

are to be performed, they may be wholly disregarded in the execution of the power.

When
directions
of author
to be
observed.

Ref 906. With the exceptions contained in the preceding sections, the intentions of the author of a power, as to the mode, time, and conditions of its execution, must be observed, subject to the power of the Court to supply a defective execution in the cases provided in Sections 915 and 939.

NOTE.—The mode—*Demarest vs. Ray*, 29 Barb., p. 563; the time—*Richardson vs. Sharpe*, 29 Barb., p. 222; *Allen vs. De Witt*, 3 N. Y., p. 278; the conditions—*Hotchkiss vs. Elting*, 26 Barb., p. 46.

Consent
of third
person to
execution
of power.

Ref 907. When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed; or be certified in writing thereon. In the first case the instrument of execution, in the second the certificate, must be subscribed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, according to the Chapter on Recording Transfers.

NOTE.—*Barber vs. Cary*, 11 N. Y., p. 398.

Same.

Ref 908. Where the consent of several persons to the execution of a power is requisite, all must consent thereto; but in case any one or more of them is dead, the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power.

NOTE.—See *Barber vs. Cary*, 11 N. Y., p. 397. This section is a departure from the rule laid down in that case. Compare Sec. 900, ante. See, also, Secs. 1355 (§47), 1425 (§96), and 1588 (§200) of the Co. Civ. Pro., Cal.

Omission
to recite
power.

Ref 909. Every instrument executed by the holder of a power conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of his power, is to be deemed

a valid execution of the power, even though not recited or referred to therein.

Rev 910. Every instrument, except a will, in execution of a power, even though the power is one of revocation only, is to be deemed a conveyance, within the meaning of the Chapter on Recording Transfers. Instruments deemed conveyances.

Rev 911. A disposition or charge, by virtue of a power, more extensive than was authorized thereby, is not therefore void; but every estate or interest so created, so far as it is embraced by the terms of the power, is valid. Certain dispositions not void.

Rev 912. The period during which the absolute right of alienation may be suspended by an instrument in execution of a power must be computed, not from the date of the instrument, but from the time of the creation of the power. Computation of term of suspension.

Rev 913. No estate or interest can be given or limited to any person by an instrument in execution of a power which could not have been given or limited at the time of the creation of the power. What estate may be given.

NOTE.—See *Dempsey vs. Tylee*, 3 Duer, pp. 73, 98, 101-2; and *Hoey vs. Kenny*, 25 Barb., p. 396.

Rev 914. When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried. Married women, their authority.

Rev 915. Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner. Defective execution.

NOTE.—*Barber vs. Cary*, 11 N. Y., p. 400.

Fraud.

Rev

916. Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or Trustees.

General and beneficial powers to married women.

Rev

917. A general and beneficial power is valid which gives to a married woman power to dispose, during her marriage and without the concurrence of her husband, of a present or future estate in real property conveyed or devised to her in fee.

NOTE.—See Jackson vs. Edwards, 7 Paige, pp. 386, 401.

Estate of owner for life, etc., when changed into a fee.

Rev

918. Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers, and incumbrancers, but subject to any future estates limited thereon, in case the power should not be executed or the property should not be sold for the satisfaction of debts.

NOTE.—Jackson vs. Edwards, 22 Wend., p. 509.

Certain powers create a fee.

Rev

919. Where an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers, and incumbrancers.

Same.

Rev

920. In all cases where an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, he is entitled to an absolute fee.

Effect of power to devise inheritance in certain cases.

Rev

921. Where a general and beneficial power to devise the inheritance is given to the owner of an estate for life or for years, he is deemed to possess an absolute power of disposition, within the meaning of the last three sections.

NOTE.—See Talmadge vs. Sill, 21 Barb., p. 52.

Rev 922. Every power of disposition is deemed absolute by means of which the holder is enabled, in his lifetime, to dispose of the entire fee, in possession or in expectancy, for his own benefit. Power to dispose of fee.

NOTE.—*Jackson vs. Edwards*, 7 Paige, p. 401.

Rev 923. Where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned. Power to revoke.

Rev 924. A special and beneficial power is valid which is granted: Special and beneficial powers, who may take.

1. To a married woman to dispose, during the marriage, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

2. To the owner of a life estate in the property embraced in the power to make leases, commencing in possession during his life.

Rev 925. A special and beneficial power to make leases of agricultural land for more than ten years, or of town and city lots for more than twenty years, is void only as to the time beyond ten or twenty years, and authorizes leases for those terms or less. Construction of leasing powers.

NOTE.—Stats. 1851, p. 169, Sec. 1. The contrary was held in *Root vs. Stuyvesant*, 18 Wend., p. 257, "by a divided vote against the opinion of all the Judges."—*Williams vs. Williams*, 8 N. Y., p. 539. It is "an anomalous case, to be rejected and shunned, not to be followed; as an authority it ought never to be quoted."—*Duer, J., Lang vs. Ropke*, 5 Sandf., p. 372. "An adjudication between the amicable parties then before the Court, and not a precedent which can affect the rights of third persons."—*Bronson, J., Hone vs. Van Shaick*, 20 Wend., p. 569; and see *Darling vs. Rogers*, 22 Wend., p. 496.

Rev 926. The power of the owner of a life estate to make leases is not transferable as a separate interest, but is annexed to his estate, and will pass, unless spe- Power to make leases by owner for life.

cially excepted, by any grant of such estate. If specially excepted in any such grant, it is extinguished.

Rel
Release of
such power.

927. The power of the owner of a life estate to make leases may be released by him to any person entitled to a future estate in the property, and is thereupon extinguished.

Rel
Mortgages
by party
having
power to
lease, etc.

928. A mortgage executed by the owner of a life estate having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein.

Rel
Effect
thereof.

929. The effects on the power of a lien by mortgage, such as is mentioned in the last section, are:

1. That the mortgagee is entitled to an execution of the power, so far as the satisfaction of his lien may require it; and,

2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage, in the same manner as if in terms embraced therein.

Rel
Special and
beneficial
powers
liable to
creditors.

930. Every special and beneficial power is liable to the claims of creditors, in the same manner as other interests that cannot be reached by execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

Rel
Future
beneficial
powers.

931. No beneficial power, general or special, not already specified and defined in this Title, can hereafter be created.

NOTE.—Jackson vs. Edwards, 7 Paige, p. 400.

Rel
Trust
powers
imperative

932. Every trust power, unless its execution is made expressly to depend on the will of the Trustee, is imperative, and imposes a duty on the Trustee, the

performance of which may be compelled for the benefit of the parties interested.

Ref NOTE.—Arnold vs. Gilbert, 5 Barb., p. 195.

Ref 933. A trust power does not cease to be imperative where the Trustee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust. Effect of right of selection.

Ref NOTE.—Hoey vs. Kenny, 25 Barb., p. 396.

Ref 934. Where a disposition under a power is directed to be made to, among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled in equal proportion. Construction of certain powers.

Ref 935. Where the terms of a power import that the estate or fund is to be distributed among several persons designated, in such manner or proportions as the Trustee of the power may think proper, the Trustee may allot the whole to any one or more of such persons in exclusion of the others. Same.

Ref 936. If the Trustee of a power, with the right of selection, dies, leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as objects of the trust. When Court to execute power.

Ref NOTE.—Hoey vs. Kenny, 25 Barb., p. 396.

Ref 937. Where a power in trust is created by will, and the testator has omitted to designate, expressly or by necessary implication, by whom the power is to be executed, its execution devolves on the District Court. Same.

Ref NOTE.—Meakings vs. Cromwell, 5 N. Y., p. 139.

Ref 938. The execution, in whole or in part, of any trust power, may be adjudged for the benefit of the creditors or assignees of any person entitled, as one of Execution of trust power when compelled by creditors, etc.

the beneficiaries of the trust, to compel its execution, when his interest is transferable.

Defective
execution.

Plu 939. Where the execution of a power in trust is defective, in whole or in part, under the provisions of this Title, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

Applica-
tion of
certain
sections.

Plu 940. The provisions of the Title on Trust, saving the rights of other persons from prejudice by the misconduct of Trustees, and authorizing the Court to remove and appoint Trustees; the provisions of the Title on Succession, devolving express trusts upon the Court on the death of the Trustee; and the provisions of Section 871, in the Title on Uses and Trusts, apply equally to powers in trust, and the Trustees of such power.

NOTE.—Hoey vs. Kenny, 25 Barb., p. 396; Hutchings vs. Baldwin, 7 Bosw., p. 236. On the general questions of the powers of Trustees as connected with the "cestui que trust" execution of resignation of the trust, see Butler vs. Welton, July Term, 1872, Cal. Rep. (No. 3,173); Welch vs. Palmer, 39 Cal., p. 456; Learned vs. Welton, 40 Cal., p. 350.

PART III.

PERSONAL OR MOVABLE PROPERTY.

TITLE I. PERSONAL PROPERTY IN GENERAL.

II. PARTICULAR KINDS OF PERSONAL PROPERTY.

TITLE I.

PERSONAL PROPERTY IN GENERAL.

SECTION 946. By what law governed.

947. Future interests in perishable property, how protected.

946. If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.

By what
law
governed.

Rev 947. Where one has the present and another the future interest in a thing personal, and the thing is perishable, the latter may require it to be sold, and the proceeds invested for the benefit of both parties, according to their respective interests; except in case of a thing specially appropriated to a particular use.

Future
interests in
perishable
property,
how
protected.

TITLE II.

PARTICULAR KINDS OF PERSONAL PROPERTY.

CHAPTER I. *Things in Action.*II. *Shipping.*III. *Products of the Mind.*IV. *Other kinds of Personal Property.*

CHAPTER I.

THINGS IN ACTION.

SECTION 953. Things in action defined.

954. Transfer and survivorship.

Things in
action
defined.

953. A thing in action is a right to recover something by a judicial proceeding.

NOTE.—*Choses in possession* are such personal things of which one has possession; *choses in action* are such as the owner has not the possession, but merely the right of action for their possession.—2 Black. Com., p. 389. Choses in action are defined by Clutty to be rights to receive or recover a debt or money or damages for breach of contract, or for a tort connected with a contract, but which cannot be enforced without action.—1 Ch. Pr., p. 140.

Transfer
and survi-
vorship.

954. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the CODE OF CIVIL PROCEDURE, it passes to his devisees or successor in office.

NOTE.—At common law a "chose in action" was not assignable.—15 Mass., p. 388; 2 John., p. 1; 1 Cranch, p. 367. In equity all choses in action were assignable, and the assignee had the right to enforce the fulfillment of the obligation in the name of the assignor.—3 Day, p. 364; 6 Pick., p. 316; 9 Cow., p. 34; 8 Yeates, p. 327.

But rights arising *ex delicto* were not assignable at law or in equity. In California it has been held that a right of action for the conversion of personal property is assignable, and that the assignee can recover upon the same in his own name.—*Layard vs. Wheeler*, 22 Cal., p. 139; *Moore vs. Massini*, 32 Cal., p. 594. So, too, of a claim for damages caused by trespass on land.—*Moore vs. Masini*, 32 Cal., p. 590. Of a contract not to run boats on a certain line of travel.—*Cal. Steam Nav. Co. vs. Wright*, 6 Cal., p. 258. Of a contract to perform work on a street.—*Taylor vs. Palmer*, 31 Cal., p. 240; *Cochrane vs. Collins*, 29 Cal., p. 129. And of an agreement to pay money to a defendant if he would withdraw his defense to a suit.—*Gray vs. Garrison*, 9 Cal., p. 325. A creditor has not the right to assign a debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated; but if such an assignment is made, the debtor alone can avail himself of the objection.—*Marzion vs. Pioche*, 8 Cal., p. 536. A vendor's lien was held not assignable.—*Baum vs. Grigsby*, 21 Cal., p. 172; *Lewis vs. Covillaud*, 21 Cal., p. 78; *Williams vs. Younger*, 21 Cal., p. 227. Nor a mortgage independent of the debt it was given to secure.—*Polhemus vs. Trainer*, 30 Cal., p. 685. Nor an unsettled account between partners.—*Bullard vs. Kinney*, 10 Cal., p. 63. Nor a cause of action for malicious prosecution.—*Lawrence vs. Martin*, 22 Cal., p. 173. Nor any cause of action arising out of a personal tort which does not survive to the personal representative of the party.—*Boyd vs. Blankman*, 29 Cal., p. 19; 3 Kernan, p. 322; 36 Barb., p. 270; 2 Kernan, p. 622; 1 Selden, p. 347. By Sec. 954 it is proposed to establish one rule for the assignability and the survivorship of things in action.—See *McKee vs. Judd*, 12 N. Y., p. 622; *Meech vs. Stoner*, 19 N. Y., p. 26.

CHAPTER II.

SHIPPING.

ARTICLE I. GENERAL PROVISIONS.

II. RULES OF NAVIGATION.

ARTICLE I.

GENERAL PROVISIONS.

SECTION 960. Definition of a ship.

- 961. Appurtenances and equipments.
- 962. Foreign and domestic navigation.
- 963. Foreign and domestic ships distinguished.
- 964. Several owners.
- 965. Owner for voyage.
- 966. Registry, etc.

Definition
of a ship.

960. A ship is any structure fitted for navigation. Every kind of ship is included in the term "shipping."

Appurte-
nances and
equipments

961. All things, belonging to the owners, which are on board a ship, and are connected with its proper use, for the objects of the voyage and adventure in which the ship is engaged, are deemed its appurtenances.

NOTE.—1 Pars. Mar. Law, p. 71.

Foreign
and
domestic
navigation

962. Ships are engaged either in foreign or domestic navigation, or in the fisheries. Ships are engaged in foreign navigation when passing to or from a foreign country; and in domestic navigation, when passing from place to place within the United States.

Foreign
and
domestic
ships dis-
tinguished.

963. A ship in a port of the State to which it belongs is called a domestic ship; in another port it is called a foreign ship.

Several
owners.

964. If a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any Court of competent jurisdiction.

NOTE.—See 2 Pars. Mar. Law, p. 555.

Owner for
voyage.

965. If the owner of a ship commits its possession and navigation to another, that other, and not the owner, is responsible for its repairs and supplies.

966. The registry, enrollment, and license of ships Registry.
etc.
are regulated by Acts of Congress.

NOTE.—3 Kent's Com., p. 133; Hesketh vs. Stevens,
7 Barb., p. 488.

ARTICLE II.

RULES OF NAVIGATION.

SECTION 970. Collisions.

1. Rules as to ships meeting each other.
2. The rule for sailing vessels.
3. Rules for steamers in narrow channels.
4. Same.
5. Rules for steam vessels on different courses.
6. Meeting of steamers.

971. Collision from breach of rules.

972. Breaches of such rules to imply willful default.

973. Loss, how apportioned.

970. In the case of ships meeting, the following Collisions.
rules must be observed, in addition to those prescribed
by that part of the POLITICAL CODE which relates to
Navigation:

1. Whenever any ship, whether a steamer or sailing Rules as to
ships meet-
ing each
other.
ship, proceeding in one direction, meets another ship,
whether a steamer or sailing ship, proceeding in
another direction, so that if both ships were to con-
tinue their respective courses they would pass so near
as to involve the risk of a collision, the helms of both
ships must be put to port so as to pass on the port side
of each other; and this rule applies to all steamers and
all sailing ships, whether on the port or starboard tack,
and whether close-hauled or not, except where the
circumstances of the case are such as to render a
departure from the rule necessary in order to avoid
immediate danger, and subject also to a due regard to
the dangers of navigation, and, as regards sailing ships
on the starboard tack close-hauled, to the keeping
such ships under command;

The rule
for sailing
vessels.

2. In the case of sailing vessels, those having the wind fair must give way to those on a wind. When both are going by the wind, the vessel on the starboard tack must keep her wind, and the one on the larboard tack bear up strongly, passing each other on the larboard hand. When both vessels have the wind large or abeam, and meet, they must pass each other in the same way on the larboard hand, to effect which two last mentioned objects the helm must be put to port. Steam vessels must be regarded as vessels navigating with a fair wind, and should give way to sailing vessels on a wind of either tack;

Rules for
steamers in
narrow
channels.

3. A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fairway or mid channel which lies on the starboard side of the steamer;

Same.

4. A steamer when passing another steamer in such channel, must always leave the other upon the larboard side;

Rules for
steam
vessels on
different
courses.

5. When steamers must inevitably or necessarily cross so near that, by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other;

Meeting of
steamers.

6. The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within sound of the steam whistle, or by the regulations concerning lights upon steamers, prescribed under authority of the Acts of Congress approved August thirtieth, eighteen hundred and fifty-two, and April twenty-ninth, eighteen hundred and sixty-four.

NOTE.—Part III, Title VI, Chap. I, Article II, Political Code, Cal.

971. If it appears that a collision was occasioned by failure to observe any rule of the foregoing section,

the owner of the ship by which such rule is infringed cannot recover compensation for damages sustained by the ship in such collision, unless it appears that the circumstances of the case made a departure from the rule necessary.

Collision from breach of rules.

972. Damage to person or property arising from the failure of a ship to observe any rule of Section 970, must be deemed to have been occasioned by the willful default of the person in charge of the deck of such ship at the time, unless it appears that the circumstances of the case made a departure from the rule necessary.

Breaches of such rules to imply willful default.

973. Losses caused by collision are to be borne as follows:

Loss, how apportioned.

1. If either party was exclusively in fault he must bear his own loss, and compensate the other for any loss he has sustained;
2. If neither was in fault, the loss must be borne by him on whom it falls;
3. If both were in fault, the loss is to be equally divided, unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned;
4. If it cannot be ascertained where the fault lies, the loss must be equally divided.

NOTE.—First Subdivision. *The Scioto*, Daveis, p. 359; *The Woodrop-Sims*, 2 Dods., p. 83; *The Sappho*, 9 Jur., p. 560; *Reeves vs. The Constitution*, Gilpin, p. 579; *Kelly vs. Cunningham*, 1 Cal., p. 365; *Innis vs. Steamer Senator*, 1 Cal., p. 456. Second Subdivision. *The Woodrop-Sims*, supra; *Stainback vs. Rae*, 14 How. (U. S.), p. 532; *The Itinerant*, 2 W. Rob., p. 236. Third Subdivision. This is the rule in Admiralty Courts.—*Cushing vs. The Fraser*, 21 How. (U. S.), p. 184; *Rogers vs. The St. Charles*, 19 id., p. 108; *The Catharine vs. Dickinson*, 17 id., p. 177; *Vaux vs. Sheffer*, 8 Moore P. C., p. 75. It is otherwise at common law.—*Dowell vs. Gen. St. N. Co.*, 5 El. & Bl., p. 195; *Gen. St. N.*

Co. vs. Mann, 14 C. B., p. 127; see Barnes vs. Cole, 21 Wend., p. 188. In Griswold vs. Sharpe, 2 Cal., p. 17, it was held that the plaintiff must be faultless. Fourth Subdivision. The Scioto, Daveis, p. 359; The Catharine of Dover, 2 Hagg. Adm., p. 145; Lucas vs. The Swann, 6 M'Lean, p. 282; The Nautilus, Ware, p. 529.

CHAPTER III.

PRODUCTS OF THE MIND.

SECTION 980. How far the subject of ownership.

981. Joint authorship.

982. Transfer.

983. Effect of publication.

984. Subsequent inventor, author, etc.

985. Private writings.

How far
the subject
of owner-
ship.

980. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.

Joint
authorship.

981. Unless otherwise agreed, a product of the mind in the production of which several persons are jointly concerned, is owned by them as follows:

1. If the product is single, in equal proportions;
2. If it is not single, in proportion to the contribution of each.

Transfer.

982. The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

Effect of
publication

983. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility

to the owner, so far as the law of this State is concerned.

NOTE.—The protection afforded by Act of Congress is a matter of Federal legislation, with which the State cannot interfere.

984. If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author, or those claiming under him.

Subsequent
inventor,
author, etc.

985. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law.

Private
writings.

NOTE.—Woolsey vs. Judd, 4 Duer, p. 389; Eyre vs. Higbee, 22 How. Pr., p. 198.

CHAPTER IV.

OTHER KINDS OF PERSONAL PROPERTY.

SECTION 991. Trade marks and signs.

992. Good will of business.

993. Same.

994. Title deeds.

Am 991. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade mark, any form, symbol, or name, which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation or part of a designation which relates only to the name, quality, or description of the thing or business.

Trade
marks and
signs.

NOTE.—Deals in—Taylor vs. Carpenter, 1 Sandf. Ch., p. 608; business—Howard vs. Henriques, 8 Sandf.,

p. 725; designation—*Amoskeag Manufacturing Co. vs. Spear*, 2 Sandf., p. 599; *Fetridge vs. Wells*, 4 Abb. Pr., p. 144. The right of property is recognized by the common law in a trade mark (*Derringer vs. Platt*, 29 Cal., p. 292), and the right is not limited by territorial bounds, but may be asserted wherever the common law affords remedies for wrongs, subject to such statutory regulations as may be made concerning the use and enjoyment of other property.—Id. The statute of eighteen hundred and sixty-three concerning trade marks did not take away the common law remedy for the protection of the same from those who did not register their trade mark according to its provisions.—Id. The name established for a hotel is a trade mark.—*Woodward vs. Lasar*, 21 Cal., p. 448. The name "Original What Cheer House," the word "Original" being painted on the sign in small letters, and in a manner calculated to deceive the public, is an invasion of the trade mark "What Cheer House."—Id. In *Lucy vs. Falkenburg*, 35 Cal., p. 52, the law relative to trade marks is ably and elaborately considered by Sanderson and Sawyer, Justices. The following are the provisions of the Political Code in relation to trade marks:

SEC. 3196. The phrase "trade mark," as used in this Chapter, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description.—26 Vict., Chap. 88, Sec. 1.

SEC. 3197. Any person may secure the exclusive use of any such trade mark or name by filing with the Secretary of State his claim to the same, and a copy or description of such trade mark or name, with his affidavit attached thereto, certified to by any officer authorized to take acknowledgments of conveyances, setting forth that he (or the firm or corporation of which he is a member) is the exclusive owner or agent of the owner of such trade mark or name.—Stats. 1863, p. 155.

SEC. 3198. The Secretary of State must keep for public examination a record of all trade marks or names filed in his office, with the date when filed and name of claimant, and must at the time of filing collect from such claimant a fee of five dollars in gold coin, to be paid into the State Library Fund.—Stats. 1863, p. 155.

SEC. 3199. Any person who has first adopted, recorded, and used a trade mark or name, whether within or beyond the limits of this State, is its original owner. Such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law; and any Court of competent jurisdiction may restrain, by injunction, any use of trade marks or names in violation of this Chapter.—Stats. 1863, p. 155.

For the provisions punishing counterfeiting of trade marks, and concerning evidence on trials therefor, see Penal Code, Secs. 350 to 354, inclusive.

992. The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. Good will of business.

NOTE.—Good will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill, affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.—Story on Partnership, Sec. 99; Harrison vs. Gardner, 2 Madd., p. 198; Bell vs. Ellis, 33 Cal., p. 620; Howe vs. Searing, 6 Bosw., p. 354.

993. The good will of a business is property, transferable like any other. Same.

NOTE.—The good will of a trade is part of the partnership property.—Bell vs. Ellis, 33 Cal., p. 620; Williams vs. Wilson, 4 Sandf. Ch., p. 379. In Farr vs. Pearce, 3 Madd., p. 79, a distinction is taken between professional partnerships, in which the pecuniary value of the good will was recognized, and commercial partnerships, in which it was intimated that the rule might be different, but Mr. Parsons doubts the value of the distinction.—1 Parsons on Contracts, p. 154.

994. Instruments essential to the title of real property, and which are not kept in a public office as a record, pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title. Title deeds.



PART IV.

ACQUISITION OF PROPERTY.

TITLE I. MODES IN WHICH PROPERTY MAY BE ACQUIRED.

- II. OCCUPANCY.
- III. ACCESSION.
- IV. TRANSFER.
- V. HOMESTEADS.
- VI. WILLS.
- VII. SUCCESSION.

TITLE I.

MODES IN WHICH PROPERTY MAY BE ACQUIRED.

SECTION 1000. Property, how acquired.

1001. Acquisition of property by exercise of eminent domain.

1000. Property is acquired by:

- 1. Occupancy;
- 2. Accession;
- 3. Transfer;
- 4. Will; or,
- 5. Succession.

Property,
how
acquired.

1001. Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the CODE OF CIVIL PROCEDURE either by consent of the owner or by proceedings had under

Acquisition
of property
by exercise
of eminent
domain.

Same. the provisions of Title VII, Part III, of the CODE OF CIVIL PROCEDURE; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

TITLE II.

OCCUPANCY.

SECTION 1006. Simple occupancy.

1007. Prescription.

Simple
occupancy.

1006. Occupancy for any period confers a title sufficient against all except the State and those who have title by prescription, accession, transfer, will, or succession.

NOTE.—Property without an owner fairly belongs to the first person who takes possession of it; and if there ever was a time when there was no such thing as exclusive individual property, occupancy may have given the first title, "for by the law of nature and reason, he who first began to use it acquired therein a transient property, that lasted so long as he was using it and no longer; or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force; but the instant that he quitted the use or occupation of it another might seize it, without injustice. Thus, also, a vine or a tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he gathered for his own repast.—2 Black. Com., p. 2. This doc-

trine was well illustrated by Cicero, when he compared the world to a great theatre, which was common to the public, and yet the place which any man had taken was for the time his own. The doctrine is now well settled that a prior possession is presumptive evidence of title, and, unexplained, is sufficient title to recover the property upon in any action against a person having no better right; as applied to the action of ejectment, for instance, the authorities upon this point are numerous and decisive. It is not necessary that there should be a continued possession, corresponding in point of time to the period prescribed by the Statute of Limitations, to furnish this presumption of right. When continued for less than this period it will prevail as a presumptive right until rebutted by proof of a prior possession, right of succession, legal title, or other evidence sufficient to defeat such presumption. In cases where no other evidence of title than possession is given by either party, the prior possession must prevail, unless such prior possession has been abandoned or the subsequent possession has been continued until protected by lapse of time and the Statute of Limitations. In California it has been held that one in the actual possession of real property may rely upon his possession alone until the opposite party shows a better right.—*Hawthurst vs. Lander*, 28 Cal., p. 331. That possession, however short, will entitle the claimant to recover, unless the defendant can account for such possession or show a prior possession or title in himself or a third person.—*Potter vs. Knowles*, 5 Cal., p. 87; *Sunol vs. Hepburn*, 1 Cal., p. 254; *Bradshaw vs. Treat*, 6 Cal., p. 172. That in actions for the recovery of land possession is primary evidence of title.—*Hicks & Martin vs. Davis*, 4 Cal., p. 67; *Plume vs. Seward*, 4 Cal., p. 94; *Hutchinson vs. Perley*, 4 Cal., p. 33; *Keane vs. Cannovan*, 21 Cal., p. 291; *Sacramento Valley R. R. vs. Moffatt*, 7 Cal., p. 57; *Norris vs. Russel*, 5 Cal., p. 249; *English vs. Johnson*, 17 Cal., p. 107. But to constitute a possession which will be evidence of ownership there must be an actual *bona fide* occupation—a *possessio pedis*—a subjection to the will and control of the possessor as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership.—*Plume vs. Seward*, 4 Cal., p. 94; *Lawrence vs. Fulton*, 19 Cal., p. 683. In the case last cited it was said that the word "occupation" might be so used with other expressions or under peculiar facts of a case as to signify residence, but that ordinarily the expressions "occupation,"

"*possessio pedis*," "subjection to the will and control," are employed as synonymous terms and as signifying actual possession. As a rule, it is more easy to acquire personal property by occupancy than real property, on account of possession being stronger evidence of title. The reason of this is, that the ownership of real property is usually evidenced by writing and by record, while the reverse is true of personal property. Walker's American Law, p. 348; Thornburgh vs. Hand, 7 Cal., p. 554; Lafontaine vs. Green, 17 Cal., p. 294.

Prescription.

1007. Occupancy for the period prescribed by the CODE OF CIVIL PROCEDURE as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.

NOTE.—In Grattan vs. Wiggins, 23 Cal., p. 36, the Court say: "Lapse of time not only applies as a defense to an action, but it forms the basis of a new title acquired by prescription, which is founded upon statute." Angell, in his work on Limitations of Actions, defines the word "limitation" as follows: "By the term limitation, as here used, is meant the time which is prescribed by the authority of law during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or equity can be maintained."—Angell on Limit., Sec. 1. Some recent statutes provide in express terms that adverse possession for the time prescribed shall extinguish adverse titles, and vest the possessor with a fee.—Act. 3 and 4, Wm. IV; Angell on Limit., App. LVII, Sec. 2. Ours, before the Code, contained no such express provision, but such was held to be its effect when properly construed.—Arrington vs. Liscom, 34 Cal., p. 381. Angell says, in the language of Mr. Chancellor Harper, in Draton vs. Marshall, 1 Rice's Eq., p. 385: "The belief is that no case can be put in which a private individual knows that another person claims, and is in the actual enjoyment of land which belongs to him, and neglects to prosecute his rights at law, when there is nothing to prevent his doing so, that he will not be barred by the Statute of Limitations."—Angell on Limit., p. 397, Sec. 2. And Angell further says: "It is also unquestionable that where the land has been held under a claim to the fee for the time prescribed by the statute, and an entry is made by the party who has the written title,

such party may be dispossessed by an ejectment brought by him who has so held and claimed."—*Ib.*, p. 398, Sec. 2. This was so held in *Jackson vs. Oltz*, 8 Wend., p. 440. The lessors of the plaintiff had been in possession for the period prescribed by the Statute of Limitations, claiming title under a patent. Defendants afterwards entered, and held under a title which had been judicially determined to be valid. The action was brought by the plaintiff's relying upon the title acquired by adverse possession against the defendant's holding such paper title, and a recovery had. The Court say: "If the possession was adverse, and had been so for more than twenty years, as it had in this case, then that possession ripened into a title, and the plaintiff must recover against the defendant, though the paper title to the fifty acres is, in reality, not in him."—8 Wend., p. 442. The same principle is recognized in *Jackson vs. Rightmeyer*, 16 John., p. 327. Mr. Chancellor Kent says, that showing a possession of thirty-eight years under a claim of right, "was showing an absolute right of possession sufficient to toll an entry." In *Bradstreet vs. Huntington*, Mr. Justice Johnson says: "That an adverse possession, where it actually exists, may be set up against any title whatsoever, either to *make out a title* under the Act of Limitations, or to show the nullity of a conveyance executed by one out of possession. On the first two of the propositions there can be no doubt, and none has been expressed."—5 Pet., p. 438. And in *Drayton vs. Marshall*, Mr. Chancellor Harper says: "The time then required to *mature a title* by the Statute of Limitations had run out more than five times before the filing of this bill."—1 Rice's Eq., p. 384. And again: "But if by the statute defendants have acquired a title to the fee, they can, of course, have no right of redemption as against themselves. This must be merged or extinguished in the fee."—*Ib.*, p. 386. These remarks all go upon the idea that adverse possession for the time prescribed confers upon the possessor some interest, some positive right; that it affords him something more than a shield; in short, invests him with a title, *thus acquired by adverse possession*. The claimants under the patent having a right of action, and being under no disability, could not be impaired by an entry by those claiming under the patent, unless made in pursuance of a judgment to which Rodgers was a party, or privy. So in *Taylor vs. Horde*, 1 Burr., p. 119, Lord Mansfield said: "Twenty years adverse possession is a *positive title* to the defendant. It is not a *bar to the action, or remedy only, but*

it takes away the right of possession." To the same effect are *Stokes vs. Berry*, 2 Salk., p. 421; and *Pedrick vs. Scarle*, 5 S. & R., p. 230. In *Leffingwell vs. Warren*, 2 Black., p. 605, the Supreme Court of the United States say: "The lapse of time limited by such statutes *not only bars the remedy*, but it *extinguishes the right and vests a perfect title in the adverse holder.*" So in *School District Number Four, in Winthrop, vs. Benson*, 81 Me., p. 384, the Court say: "A legal title is equally valid when once acquired, whether it be by disseizin or by deed, it vests the fee simple, although the modes of proof, when adduced to establish it, may differ. * * * When the title is in controversy, it is to be shown by legal proof, and a continuous disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for twenty years, would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed."—See, also, *Barrush vs. Thompson*, 7 Term R., p. 492; *Beckford vs. Wade*, 17 Ves. Jr., p. 87; *Moore vs. Luce*, 29 Pa., p. 260; *Thompson vs. Green*, 4 O. St., p. 223; *Newcombe vs. Leavitt*, 22 Ala., p. 631; *Thorn vs. Lee*, 5 Geo., p. 217; *Chiles vs. Jones*, 4 Dana, p. 483. In *San Francisco vs. Fulde*, 37 Cal., p. 351, it was contended that an adverse possession *continues in point of time*, for the period of five years, though such possession was held by several persons successively, but without any privity; or, in other words, that in order to make up the five years adverse possession the person in possession was entitled to add to his own possession that of those who preceded him, although he did not enter into possession under or through his predecessors. The Court, in answer to this position, said: "In *Arrington vs. Liscom*, 34 Cal., p. 365, it is held that the adverse possession for the period described by the statute, not only bars the remedy, but extinguishes the right of the party holding the title." (See, also, *Cannon vs. Stockman*, 36 Cal., p. 535.) "As such adverse possession is the means by which the former title is extinguished, and a new one created, those means must necessarily proceed from the person in whom the better title vests; that is to say, his adverse possession alone, or the adverse possession of him and those through whom he claims, and under

whom he entered, must fill the statutory period. Adverse possession, to be available as a defense, or as a title, must have been continuous, both in time and in interest."—See *McManus vs. O'Sullivan*, July Term, 1872.

TITLE III.

ACCESSION.

CHAPTER I. *To Real Property.*

II. *To Personal Property.*

CHAPTER I.

ACCESSION TO REAL PROPERTY.

SECTION 1013. Fixtures.

- 1014. Alluvion.
- 1015. Sudden removal of bank.
- 1016. Islands, in navigable streams.
- 1017. In unnavigable streams.
- 1018. Islands formed by division of stream.
- 1019. Abandoned bed of stream.

See 1013. When a person affixes his property to the **Fixtures.** land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it.

NOTE.—See notes to Secs. 658, 660, 661, ante. The united application of the following requisites is perhaps the safest criterion of a fixture: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Appropriation to the use or purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the

annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.—*Teal vs. Hewitt*, 1 Ohio State, p. 511.

Alluvion. 1014. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

NOTE.—Code Napoleon, Arts. 556, 557; Civil Code of Louisiana, Art. 501; *Morgan vs. Livingston*, 6 M., p. 216; *Livingston vs. Herman*, 9 M. R., p. 656. "That ground which a river has added to your estate by alluvion, becomes your own by law of nations; and that is said to be alluvion which is added so gradually that no one can judge how *much* is added in each moment of time."—*Cooper's Justinian*, Lib. 2, Tit. 1; 3 Barn. & Cress., p. 91. Imperceptible.—*Halsey vs. McCormack*, 18 N. Y., p. 147; *Emans vs. Turnbull*, 2 Johns., p. 313. If the formation is sudden; held in New York that it belonged to the State.—*Id.* Accumulation of material.—*Emans vs. Turnbull*, 2 Johns., p. 313. The rule of the common law gave to riparian owners the soil formed by imperceptible or inconsiderable augmentation or deposits, on the ground or principle that the profits and advantages of a thing belong of right to him who, under a change of circumstances, is exposed to suffer its damages and losses.—See U. S. Land Office Report, 1868, by J. S. Wilson, p. 127.

Sudden removal of bank.

1015. If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

NOTE.—Where the soil is suddenly taken from one man's estate and carried to another's by the immediate and manifest power of a river or stream, the property belongs to the first owner; but an acquiescence on his part will in time entitle the owner of the land to which it is attached to claim it as his own.—*Bract.*, p. 221; 2 Black. Com., p. 262; Code Napoleon, Art. 559; Civil

Code La., Art. 503. Avulsion differs from alluvion in this, that in the latter case the change of the soil is gradual and imperceptible.

1016. Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary.

Islands, in navigable streams.

NOTE.—Code Napoleon, Art. 560; Civil Code La., Art. 504.

1017. An island, or an accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed; or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

In unnavigable streams.

NOTE.—This, and the three sections following, are similar to the Code Napoleon, Arts. 560-563; Civil Code La., Arts. 506-510.

1018. If a stream, navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

Islands formed by division of stream.

Reh Sub. 1019. If a stream, navigable or not navigable, forms a new course, abandoning its ancient bed, the owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived.

Abandoned bed of stream.

NOTE.—See notes to Chapter on "Public Waters," in Political Code.

CHAPTER II.

ACCESSION TO PERSONAL PROPERTY.

SECTION 1025. Accession by uniting several things.

1026. Principal part, what.

SECTION 1027. Same.

1028. Uniting materials and workmanship.

1029. Inseparable materials.

1030. Materials of several owners.

1031. Willful trespassers.

1032. Owner may elect between the thing and its value.

1033. Wrongdoer liable in damages.

Accession
by uniting
several
things.

1025. When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him.

NOTE.—The provisions of this Chapter, except Sec. 1031, are similar to those of the Code Napoleon and the Code of Louisiana.

Principal
part, what.

1026. That part is to be deemed the principal to which the other has been united only for the use, ornament, or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

Same

1027. If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part.

Uniting
materials
and work-
manship.

1028. If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials.

1029. Where one has made use of materials which in part belong to him and in part to another, in order

to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship.

Inseparable materials.

1030. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner without whose consent the admixture was made may require a separation, if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

Materials of several owners.

1031. The foregoing sections of this Article are not applicable to cases in which one willfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of the material, if its identity can be traced.

Willful trespassers.

NOTE.—*Silsbury vs. McCoon*, 3 N. Y., p. 379.

1032. In all cases where one whose material has been used without his knowledge, in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material in kind, in the same quantity, weight, measure, and quality, or the value thereof; or where he is entitled to the product, the value thereof in place of the product.

Owner may elect between the thing and its value.

Wrongdoer
liable in
damages.

1033. One who wrongfully employs materials belonging to another is liable to him in damages, as well as under the foregoing provisions of this Chapter.

TITLE IV.

TRANSFER.

CHAPTER I. *Transfer in General.*

- II. *Transfer of Real Property.*
- III. *Transfer of Personal Property.*
- IV. *Recording Transfers of Real Property.*
- V. *Unlawful Transfers.*

NOTE.—The obligations of the parties to a transfer for consideration, or to a contract of hiring, are regulated by the Titles on Sales, on Exchange, and on Hiring. Transfers in trust for the benefit of creditors are regulated by the Part on Debtor and Creditor.

CHAPTER I.

TRANSFERS IN GENERAL.

ARTICLE I. DEFINITION OF TRANSFER.

- II. WHAT MAY BE TRANSFERRED.
- III. MODE OF TRANSFER.
- IV. INTERPRETATION OF GRANTS.
- V. EFFECT OF TRANSFER.

ARTICLE I.

DEFINITION OF TRANSFER.

SECTION 1039. Transfer, what.

1040. Voluntary transfer.

1039. Transfer is an act of the parties, or of the

law, by which the title to property is conveyed from one living person to another. Transfer, what.

NOTE.—Bouvier defines "Transfer" to be "the act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter."

1040. A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity. Voluntary transfer.

NOTE.—Rules of law—Fletcher vs. Peck, 6 Cranch., p. 136; People vs. Platt, 17 Johns., p. 195; Varick vs. Briggs, 22 Wend., p. 543; Van Rensselaer vs. Ball, 19 N. Y., p. 100. The last clause in Sec. 1040 was proposed for enactment in regard to grants of real property, by the New York Revisers, in eighteen hundred and twenty-eight, but was not enacted; yet it would seem that, independent of statutory enactment, it is the law.—Bunn vs. Winthrop, 1 Johns. Ch., p. 329; Irons vs. Smallpice, 2 B. and Ald., p. 551; Jackson vs. Garnsey, 16 Johns., p. 189.

ARTICLE II.

WHAT MAY BE TRANSFERRED.

SECTION 1044. What may be transferred.

1045. Possibility.

1046. Right of reëntry can be transferred.

1047. Owner ousted of possession may transfer.

1044. Property of any kind may be transferred, except as otherwise provided by this Article. What may be transferred.

NOTE.—Conderman vs. Smith, 41 Barb., p. 404; Lautner vs. Snyder, 15 Barb., p. 621.

1045. A mere possibility, not coupled with an interest, cannot be transferred. Possibility

NOTE.—Jackson vs. Bradford, 4 Wend., p. 619; Tooley vs. Dibble, 2 Hill, p. 641; Otis vs. Sill, 8 Barb., p. 111; Edwards vs. Varick, 5 Den., p. 664; Conderman vs. Smith, 41 Barb., p. 404; 19 N. Y., p. 384.

1046. A right of reëntry, or of repossession for breach of condition subsequent, can be transferred. Right of reëntry can be transferred

NOTE.—See note to Section 1047.

Owner
ousted of
possession
may
transfer.

1047. Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession.

NOTE.—At common law the conveyance of land in the adverse possession of another was void, and this is the law at the present time in several of the States; but the common law rule has never prevailed in this State, having been abrogated by statute. The reason of the ancient common law doctrine does not exist here. When livery of seisen was necessary, as it could only be made by the person in possession, it followed as matter of course that a conveyance by a person out of possession was void. In this State the execution and delivery of a deed without livery of seisen or entry consummates a conveyance, and therefore there is no good reason why the conveyance of land to which the grantor has a rightful claim should not be valid.

ARTICLE III.

MODE OF TRANSFER.

- SECTION 1052. When oral.
 1053. Grant, what.
 1054. Delivery necessary.
 1055. Date.
 1056. Delivery to grantee is necessarily absolute.
 1057. Delivery in escrow.
 1058. Surrendering or canceling grant does not reconvey.
 1059. Constructive delivery.
 1060. Gratuitous grants take effect immediately; exception.

When oral. 1052. A transfer may be made without writing, in every case in which a writing is not expressly required by statute.

NOTE.—4 N. Y., p. 497; 7 Exch., p. 581.

Grant,
what.

Am 1053. A transfer in writing is called a grant.

Delivery
necessary.

1054. A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor.

NOTE.—Hastings vs. Vaughan, 5 Cal., p. 315; Bar vs. Schroeder, 32 Cal., p. 610. As to delivery, see cases cited in note to the next section; also, Sec. 1057. A

delivery after the grantor's death is of no effect.—*Roosevelt vs. Carow*, 6 Barb., p. 190; *Jackson vs. Leek*, 12 Wend., p. 107.

1055. A grant duly executed is presumed to have been delivered at its date.

NOTE.—*Bagley vs. McMickle*, 9 Cal., p. 430; *Bensley vs. Atwill*, 12 Cal., p. 231; *Bar vs. Schroeder*, 32 Cal., p. 610; *Fitch vs. Bunch*, 30 Cal., p. 208; *Harris vs. Norton*, 16 Barb., p. 264.

1056. A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

Delivery to grantee is necessarily absolute.

NOTE.—Delivery to him.—*Brannan vs. Bingham*, 26 N. Y., p. 483; *Worrall vs. Munn*, 5 N. Y., p. 229. Where one person is agent of both parties, delivery to him is not necessarily absolute.—*Iliff vs. Cincinnati*, etc., R. R., 13 Ohio St., p. 235.

1057. A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow.

Delivery in escrow.

NOTE.—Where a deed is placed in the hands of a third person as an escrow, with an agreement that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed, until he has strictly complied with the conditions.—*Dyson vs. Bradshaw*, 23 Cal., p. 528. If the grantor deposit with a third person a deed, to be by such person delivered to the grantee upon the order of an agent of the grantor, and before the agent gives such order the grantor directs the third person not to deliver the deed, his authority to deliver ceases.—*Fitch vs. Bunch*, 30 Cal., p. 208. A deed so deposited is not an escrow, as it is deemed in law to be still in the possession of the grantor.—*Id.* To make the deed an escrow, the parties must have bargained and sold, and performed every act necessary to constitute a complete contract, and the deed must then be deposited with a

third person, to be delivered to the grantee upon the performance by him of some condition. It must be no longer under the control of the grantor.—*Id.*; see, also, *Beam vs. McKusick*, 10 Cal., p. 538.

Surrendering or canceling grant does not reconvey.

1058. Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.

NOTE.—If the title to land is passed by the execution and delivery of a deed, it cannot afterwards be divested by the surrender and destruction of the deed.—*Bowman vs. Cudworth*, 31 Cal., p. 148; *Snodgrass vs. Pickett*, 13 Cal., p. 359; *Kearsing vs. Kilian*, 18 Cal., p. 491; *Killy vs. Willson*, 33 Cal., p. 691; *Lawton vs. Gordon*, 34 Cal., p. 36; *Byron vs. Bradshaw*, 23 Cal., p. 528.

Constructive delivery.

1059. Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed.

NOTE.—The delivery of a conveyance is a question of fact to be determined by the jury, and depends more upon the intention of the parties than upon the mode of fulfilling that intention.—*Hastings vs. Vaughn*, 5 Cal., p. 513; see, also, *Bensley vs. Atwill*, 12 Cal., p. 231; *Barr vs. Schroeder*, 32 Cal., p. 610; *Bagley vs. McMickle*, 9 Cal., p. 430.

Gratuitous grants take effect immediately; exception.

Act
1060. A grant made as a mere gratuity takes effect upon its execution, even though the grantor retains possession, unless a contrary intention appears.

NOTE.—*Loverbye vs. Arden*, 1 Johns. Ch., p. 240; *Bunn vs. Winthrop*, *Id.*, p. 329; *Roosevelt vs. Carew*, 6 Barb., p. 190.

ARTICLE IV.

INTERPRETATION OF GRANTS.

SECTION 1066. Grants, how interpreted.

1067. Limitations, how controlled.

1068. Recitals, when resorted to.

1069. Interpretation against grantor.

1070. Irreconcilable provisions.

1071. Meaning of "heirs" and "issue," in certain remainders.

1072. Words of inheritance unnecessary.

1066. Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this Article.

Grants,
how
interpreted

NOTE.—The first step in the construction of a deed is to ascertain the intention of the parties; and to arrive at this intention, the situation of the parties and subject matter at the time of its execution should be considered. The whole deed should be taken together, and effect should, if possible, be given to all of its parts, although the immediate object of inquiry be the meaning of an isolated clause.—*Brannan vs. Mesick*, 10 Cal., p. 95; *Mulford vs. Le Franc*, 26 Cal., p. 111. The words "northerly," "southerly," "easterly," "westerly," mean due courses, unless controlled by other words, or by natural objects.—*Bosworth vs. Dantiew*, 25 Cal., p. 296; *Fratt vs. Woodward*, 32 Cal., p. 219; *Colton vs. Seavey*, 22 Cal., p. 496. The grantor has a right, by a clause inserted in the deed, to set aside the general sense of the words he uses, and to assign to them another and different meaning.—*Morrison vs. Wilson*, 30 Cal., p. 344.

1067. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

Limita-
tions, how
controlled.

NOTE.—*Nicoll vs. N. Y. & Erie R. R. Co.*, 12 N. Y., p. 129; *Jewett vs. Jewett*, 16 Barb., p. 150; *Thornhill vs. Hall*, 2 Clark & Fin., p. 22.

1068. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

Recitals,
when
resorted to

NOTE.—*Ringer vs. M'Cann*, 3 M. & W., p. 343; *Bailey vs. Lloyd*, 5 Russ., p. 330; *Doe, A, Rogers vs.*

Brooks, 3 Ad. & El., p. 513; Walsh vs. Trevanion, 15 Q. B., p. 733.

• Interpretation
against
grantor.

1069. A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

NOTE.—Deeds are to be construed most strongly against the grantor when there is any uncertainty or ambiguity in their terms.—Dodge vs. Walley, 22 Cal., p. 224; Vincent vs. Spicer, 22 Beav., p. 383; Jackson vs. Gardner, 8 Johns., p. 394; Jackson vs. Blodgett, 16 Johns., p. 172. But reservations in a deed are to be construed in favor of the grantor.—Bowes vs. Ravensworth, 15 C. B., p. 512. The rule first stated in this note does not apply to grants made by a public officer or body to an individual. In such a grant it is presumed that all uncertainty was caused by the grantee, and therefore the language used is construed in favor of the grantor.—Stourbridge Canal Co. vs. Wheely, 2 B. & Ad., p. 792; Jackson vs. Reeves, 3 Cal., p. 293; Gildart vs. Gladstone, 11 East., p. 675; see Mohawk Bridge Co. vs. Utica & Schen. R. R. Co., 6 Paige, p. 554; Hull Dock Co. vs. La Marche, 8 B. & C., p. 42.

Irreconcilable
provisions.

1070. If several parts of a grant are absolutely irreconcilable, the former part prevails.

NOTE.—Havens vs. Dale, 18 Cal., p. 359; Jewett vs. Jewett, 16 Barb., p. 157.

Meaning of
"heirs"
and
"issue," in
certain
remainders

1071. Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.

NOTE.—Stats. 1855, p. 171, Sec. 2; Norris vs. Beyea, 13 N. Y., p. 273; Tyson vs. Blake, 22 N. Y., p. 558.

Words of
inheritance.
unneces-
sary.

1072. Words of inheritance or succession are not requisite to transfer a fee in real property.

NOTE.—Stats. 1855, p. 171, Sec. 3.

ARTICLE V.

EFFECT OF TRANSFER.

SECTION 1083. What title passes.

1084. Incidents.

1085. Grant may inure to benefit of stranger.

1083. A transfer vests in the transferee all the actual title to the thing transferred which the transferer then has, unless a different intention is expressed or is necessarily implied.

What title passes.

NOTE.—*Nicoll vs. N. Y. & Erie R. R. Co.*, 12 N. Y., p. 121; *Wooster vs. Sherwood*, 25 N. Y., p. 278; *Wheelwright vs. De Peyster*, 1 Johns., p. 471; *Sage vs. Cartwright*, 9 N. Y., p. 49; *Warren vs. Leland*, 2 Barb., p. 624.

1084. The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.

Incidents.

NOTE.—Everything essential to the beneficial enjoyment of the property, in the absence of language indicating a different intention on the part of the grantor, passes to the grantee.—*Sparks vs. Hess*, 15 Cal., p. 186; *Battle vs. Coit*, 26 N. Y., p. 404; *Lampman vs. Milks*, 21 id., p. 505; *Huttemeier vs. Albro*, 18 id., p. 48; *Leroy vs. Platt*, 4 Paige, p. 77; *Bowdoin vs. Coleman*, 6 Duer, p. 182; 3 Abb. Pr., p. 431; *Langdon vs. Buel*, 9 Wend., p. 80; *Jackson vs. Blodgett*, 5 Cow., p. 202; *Green vs. Hart*, 1 Johns., p. 580; see *Rose vs. Baker*, 13 Barb., p. 230. But the transfer of the incident to a thing does not transfer the thing itself.—*Kellogg vs. Smith*, 26 N. Y., p. 18; *Battle vs. Coit*, 26 N. Y., p. 404; see *Nostrand vs. Durland*, 21 Barb., p. 478.

1085. A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto.

Grant may inure to benefit of stranger.

NOTE.—This was not so at common law.—*Hornbeck vs. Westbrook*, 9 Johns., p. 73; *Craig vs. Wells*, 11 N. Y., p. 315. But the law in England is now as stated in Sec. 1085.—8 and 9 Vic., ch. 106, Sec. 5.

CHAPTER II.

TRANSFER OF REAL PROPERTY.

ARTICLE I. MODE OF TRANSFER.

II. EFFECT OF TRANSFER.

ARTICLE I.

MODE OF TRANSFER.

SECTION 1091. Requisites for transfer of certain estates.

1092. Form of grant.

1093. Grant by married women, how acknowledged.

1094. Power of attorney of married women, how acknowledged.

1095. Attorney in fact, how must execute for principal.

Requisites
for transfer
of certain
estates.

1091. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

NOTE.—*Sandfoss vs. Jones*, 35 Cal., p. 481. A sale of land at auction, where no note or memorandum is made by the auctioneer, and no writing exists, is void. *People vs. White*, 6 Cal., p. 75. A verbal authority to one man to take up a mining claim for another is sufficient.—*Gore vs. McBrayer*, 18 Cal., p. 582. Statute of Frauds applies as well to conveyances made by corporations as to those made by individuals.—*Smith vs. Morse*, 2 Cal., p. 524; *Board of Education vs. Fowler*, 19 Cal., p. 21. A lease for more than one year, executed by the lessees and by an agent of the lessors, but who had no written authority to do so, is void.—*Folsom vs. Perrin & Dodge*, 2 Cal., p. 603. A release of an equitable estate in land must be in writing and subscribed by the party granting the same, or by his agent, authorized by writing.—*Millard vs. Hathaway*, 27 Cal., p. 119; *Hoen vs. Simons*, 1 Cal., p. 119; *Tohler vs. Folsom*, 1 Cal., p. 207; *Videau vs. Griffin*, 21 Cal., p. 389; *McLaren vs. Hutchinson*, 22 Cal., p. 187; *Bayles vs. Baxter*, 22 Cal., p. 575. Equity never allows the Statute of Frauds to operate as a protection to fraud, but will, for the purpose of showing

that fraud has been committed or attempted, admit parol evidence, even against the words of the statute. *Hidden vs. Jordan*, 21 Cal., p. 92; 28 Cal., p. 303; 32 Cal., p. 398. If a purchaser of real property, under a verbal agreement, pays the consideration, enters into possession, and expends money upon it, the case is not within the Statute of Frauds.—*Hoffman vs. Fett*, 39 Cal., p. 109. A verbal agreement for an exchange of real property, carried into effect by the execution of a proper conveyance in pursuance of the agreement, is not void.—*Ryan vs. Tomilson*, 39 Cal., p. 639. The aid of the Statute of Frauds cannot be invoked by a mere intruder.—*Id.*

1092. A grant of an estate in real property may be made in substance as follows: Form of grant.

"I, A B, grant to C D all that real property situated in (insert name of county) County, State of California, bounded (or described) as follows: (here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, 'The Norris Ranch.')

"Witness my hand this (insert day) day of (insert month), 18—.

"A B."

NOTE.—In England, the following form is prescribed by 8 and 9 Vic., ch. 119:

"This indenture, made, etc., in pursuance of an Act to facilitate the conveyance of real property, between A B and C D, witnesseth: That, in consideration of —, now paid by the said C D to the said A B (the receipt whereof is hereby by him acknowledged), he, the said A B, doth grant unto the said C D, his heirs and assigns, forever, all that —.

"In witness whereof the said parties hereto have hereunto set their hands and seals."

Chancellor Kent (4 Com., p. 461) recommends the following:

"I, A B, in consideration of one dollar to me paid by C D, grant to him the lot of land (describing it).

"Witness my hand and seal," etc.

A form briefer still was held sufficient in Kentucky (*Chiles vs. Conley*, 2 Dana, p. 23).

It will be observed that the form in Sec. 1092 omits the recital of a consideration. Such a recital is,

under the Codes, unnecessary in any kind of a contract. The writing imports a consideration.—See Subdivision 39 of Sec. 1963 of the CODE OF CIVIL PROCEDURE.

Grant by
married
women,
how
acknowledged.

1093. No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by Sections 1186 and 1191.

NOTE.—A conveyance by a married woman of her separate estate, unless executed and acknowledged in the manner and form prescribed by statute, is inoperative.—*Smith vs. Greer*, 31 Cal., p. 476; *Dow vs. Gould & Curry S. M. Co.*, 31 Cal., p. 629; *Morrison vs. Wilson*, 13 Cal., p. 494; *Landers vs. Bolton*, 26 Cal., p. 393; *Ingolsby vs. Juan*, 12 Cal., p. 564. But it is not necessary that the husband's name should appear in the body of the deed. It is sufficient if he sign, seal, and acknowledge it.—*Dentzel vs. Waldie*, 30 Cal., p. 138.—The fact that a married woman executes a deed raises no presumption of knowledge on her part of its contents.—*Pease vs. Barbiers*, 10 Cal., p. 436. The provisions of our statutes requiring a deed conveying the separate property of the wife to be signed by the husband is constitutional.—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal., p. 629. Under the civil law a married woman could convey her property with the bare assent of her husband.—*Bodley vs. Furgeson*, 30 Cal., p. 511. Hence lands acquired by a married woman under the Mexican laws as her separate property might have been conveyed before the adoption of our statutes by an informal instrument, or possibly without writing, with the bare assent of her husband.—*Ingoldsby vs. Juan*, 12 Cal., p. 564; see also *Bodley vs. Furgeson*, 30 Cal., p. 511.

Power of
attorney of
married
women,
how
acknowledged.

1094. A power of attorney of a married woman, authorizing the execution of an instrument transferring an estate in her separate real property, has no validity for that purpose until acknowledged by her in the manner provided in Sections 1186 and 1191.

NOTE.—Stats. 1863, p. 165; *Mott vs. Smith*, 16 Cal., p. 533; *Dow vs. Gould & Curry S. M. Co.*, 31 Cal., p. 629; *Raccoullat vs. Sansevain*, 32 Cal., p. 376. In

Dentzel vs. Waldie (30 Cal., p. 138) the cases are reviewed and affirmed, in which it was held that prior to the passage of the Act of April third, eighteen hundred and sixty-three, a married woman could not sell and convey her separate estate by an attorney in fact.

1095. When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

Attorney in fact, how must execute for principal.

NOTE.—A deed executed by an attorney in fact must be executed in the name of the principal, otherwise nothing will pass by the deed.—Morrison vs. Bowman, 29 Cal., p. 337; Fisher vs. Salmon, 1 Cal., p. 413; Echols vs. Cheney, 28 Cal., p. 157; Videau vs. Griffin, 21 Cal., p. 389. But a deed executed by an attorney (duly authorized) in his own name is good as an agreement, and the principal will be decreed to make a valid conveyance.—Salmon vs. Hoffman, 2 Cal., p. 138.

ARTICLE II.

EFFECT OF TRANSFER.

SECTION 1104. What easements pass with property.

- 1105. When fee simple title is presumed to pass.
- 1106. Subsequently acquired title passes by operation of law.
- 1107. Grant, how far conclusive on purchasers.
- 1108. Conveyances by owner for life or for years.
- 1109. Grant made on condition subsequent.
- 1110. Instrument to pass an estate on condition precedent only an executory contract.
- 1111. Grant of rents, reversions, and remainders.
- 1112. Boundary by highway, what passes.
- 1113. Implied covenants.
- 1114. What the term "incumbrances" embraces.
- 1115. Lineal and collateral warrantees abolished.

1104. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is trans-

What easements pass with property.

ferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

NOTE.—Passes all the easements.—*Eno vs. Del Vecchio*, 4 Duer, p. 53; *United States vs. Appleton*, 1 Sumn., p. 492; see *Huttemeier vs. Albro*, 18 N. Y., p. 48; *Sparks vs. Hess*, 15 Cal., p. 186. A deed conveying a right of way upon land for a ditch is a conveyance of the ditch itself.—*Reed vs. Spicer*, 27 Cal., p. 57. Passes property permanently used.—*Lampman vs. Milks*, 21 N. Y., p. 505; *Huttemeier vs. Albro*, 18 id., p. 48; *Thayer vs. Payne*, 2 Cush., p. 327; *Nicholas vs. Chamberlain*, Cro. Jac., p. 121; *Robbins vs. Barnes*, Hobart, p. 131. Although the question does not seem to have been decided, there can be little doubt that the grantee is entitled to the benefit of these quasi easements, whether existing at the time a grant is bargained for, or at the time when it is actually delivered.

When fee simple title is presumed to pass.

1105. A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

Subsequently acquired title passes by operation of law.

1106. Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.

NOTE.—*San Francisco vs. Lawton*, 18 Cal., p. 477; *Lent vs. Morrill*, 25 Cal., p. 500; *Morrison vs. Wilson*, 30 Cal., p. 347; *Kirkaldie vs. Larrabee*, 31 Cal., p. 457; *Green vs. Clark*, 31 Cal., p. 593; *Cadiz vs. Majors*, 33 Cal., p. 289.

By the common law there were only two classes of conveyances which were held to operate upon the after-acquired title—those by feoffment, by fine, or by common recovery—and this from their solemnity and publicity, and those by indentures. No other forms of conveyance, in the absence of covenants of warranty, had any effect in transferring the title subsequently acquired. A grant or release only operated upon the estate actually held at the time of its execution by the grantor or releasor. Thus says Bacon: "It is laid down as a general rule that a man cannot grant or charge that which he hath not; and, therefore, if a man grant a rent-charge out of the manor of Dale, and in

truth he hath not anything in the manor of Dale, and afterward he purchased the manor of Dale, yet he shall hold it discharged."—4 Abridgement, p. 514. "And no right," says Littleton, "passeth by release, but the right which the releasor had at the time of the release made. For if there be father and son, and the father be disseized, and the son (living with his father) releaseth by deed to the disseizor, all the right which he hath, or may have, in the same tenements, without clause of warranty, etc., and after the father dieth, etc., the son may lawfully enter upon the possession of the disseizor, for that he had no right in his father's life, but the right descended to him after the release made by the death of his father." Whatever may be the grounds upon which the distinction rests between the operations of a conveyance by feoffment, fine, or common recovery, upon future acquired estates, and that of a grant or release [and on this point see Butler's Note 231 to Coke upon Littleton], it is well established and recognized in England. And though in this country conveyances by feoffment, fine, or common recovery, are not in use, no greater effect is given to a grant, or a conveyance by bargain and sale, or lease and release, unaccompanied with covenants of warranty, than at the common law under the Statute of Uses. They pass only the estates which are vested in interest at the time, and do not bind or transfer, by way of estoppel, future or contingent estates. Such is the doctrine of the most maturely considered cases, though we admit there are conflicting authorities on the point. Some of the earlier cases in New York would seem to hold, without reference to the existence of a warranty, that where one conveyed land to which he had no title, he was estopped from claiming, as against his deed, any after-acquired estate in the premises (*Johnson vs. Bull*, Johns. Cases, p. 81; *Jackson vs. Murray*, 12 id., p. 201); but these cases, if going to that extent, were afterward overruled, and the very opposite doctrine has been repeatedly affirmed, and is now the settled law of the State. In *Jackson vs. McCracken*, 14 Johns., p. 193, one Boise, by his deed-poll in seventeen hundred and ninety-four, describing himself as a late private in the New York Regiment, granted, bargained, sold, and quitclaimed to the lessor of the plaintiff in fee, "all that military right or parcel of land granted to him as bounty lands for his services in the regiment aforesaid during the late war." In eighteen hundred and six the Legislature authorized the Commissioners of the Land Office to issue a patent to him for the quantity

of two hundred acres in the tract set apart for the use of the line of State serving in the army of the United States; and the land was accordingly patented to him. The Judge who tried the cause ruled that the deed from Boise to the lessor of the plaintiff, being prior in date to the patent, did not entitle him to recover. In refusing a motion for a new trial, the Supreme Court said: "The deed from Boise to McCracken is a bargain and sale, and quitclaim, and he had then no title to convey in the premises; and no title, not then in esse, would pass, unless there was a warranty in the deed, in which last case it would operate as an estoppel for avoiding circuitry of action."—See, also, *Jackson vs. Hubble*, 1 Cow., p. 613; *Jackson vs. Bradford*, 4 Wend., p. 622; *Pelletreau vs. Jackson*, 11 Wend., p. 110; *Jackson vs. Waldrow*, 13 id., p. 178; *Varick vs. Edwards*, 11 Paige, p. 290; *Edwards vs. Varick*, 5 Denio, p. 665.

The same doctrine is recognized by the Supreme Court of New Hampshire, in *Kimball vs. Blaisdell*, 5 N. H., p. 533; by the Supreme Court of Massachusetts, in *Somes vs. Skinner*, 3 Pick., p. 47, and in *Comstock vs. Smith*, 13 id., p. 116; by the Supreme Court of Connecticut, in *Dart vs. Dart*, 7 Conn., p. 250; by the Supreme Court of Ohio, in *Kinsmore vs. Loomis*, 11 Ohio, p. 475; and by the Court of Appeals in Virginia, in *Driscoll vs. Buchanan's Ex'rs*, 3 Leigh, p. 365.

Authorities from other States might be cited to the same effect. These are sufficient to show the general doctrine sustained in the United States. They establish that no estate can be passed by the ordinary terms of a deed unaccompanied with covenants of warranty, which is not vested in interest at the time, and that estates subsequently acquired, whether by purchase or descent, are unaffected by such previous conveyance in the hands of the grantor or those claiming under him. The general doctrine thus stated is, however, subject to this qualification, that where it distinctly appears upon the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive, reciprocally, a certain estate, the grantor will be estopped from denying the operation of the deed according to such intent. Thus, in *Van Rensselaer vs. Kearney* (11 How., p. 322) the Court, after reciting several authorities, said: "The principle, deducible from these authorities, seems to be that whatever may be the form or nature of the conveyance used to pass real property, if grantor sets forth on the face of the

instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizen or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterward denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it.

The thirty-third section of the Act concerning conveyances changed the rule of the common law as to the effect of deeds under the Statute of Uses upon subsequently acquired interests of the grantor, and gave to them an operation equivalent to the most expressive covenant of warranty. That section reads as follows: "If any person shall convey any real estate, by conveyance, purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance," and is substantially incorporated in Section 1106 of this Code. A deed with a covenant of warranty operates upon future acquired interest, not as in fact passing such interest, but by way of estoppel upon the grantor against assertion. He is not permitted to attack a title the validity of which he has covenanted to maintain. If he could succeed in defeating the title he would, by his success, immediately become liable to the grantee upon his covenant; and hence, to avoid circuitry of action and to enforce complete justice without delay and further litigation, the doctrine of estoppel is applied. The section cited from the statute of this State goes beyond the usual covenant of warranty; it provides that the new estate "shall immediately pass to the grantee," and that the conveyance shall be as valid as if such estate had been in the grantor at the time of the execution. The effect, then, of its provis-

ions upon a conveyance of premises in fee is the same as if it were written upon its face that the grantor conveyed all the estate which he then possessed, or which he might at any time thereafter acquire.—*Clark vs. Baker*, 14 Cal., p. 630.

As a quitclaim deed only purports to release and quitclaim whatever interest the grantor possesses at the time (*San Francisco vs. Lawton*, 18 Cal., p. 465), it does not convey a subsequently acquired title.—*Morrison vs. Wilson*, 30 Cal., p. 344; *Cadiz vs. Majors*, 33 Cal., p. 289.

Grant, how
far conclu-
sive on
purchaser.

1107. Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.

Convey-
ances by
owner for
life or for
years.

1108. A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

Grant
made on
condition
subsequent

1109. Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record.

NOTE.—This section was intended to secure record evidence of title to the grantor as fully as he had it before the making of the grant.

Instrument
to pass an
estate on
condition
precedent
only an
executory
contract.

1110. An instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property. Upon the performance of the condition, the grantee is entitled

to a grant from the grantor or his successors for the property, duly acknowledged for record.

NOTE.—See *Mesick vs. Sunderland*, 6 Cal., p. 297; *Brannan vs. Mesick*, 10 Cal., p. 95; *Bird vs. Dennison*, 7 Cal., p. 303; *Stafford vs. Lick*, 7 Cal., p. 489; *Tewkesbury vs. Provizzo*, 12 Cal., p. 25.

1111. Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby.

Grant of rents, reversions, and remainders.

NOTE.—Stats. 1855, p. 171, Sec. 6.

1112. A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof.

Boundary by highway, what passes.

1113. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance:

Implied covenants.

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee;

2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

NOTE.—Stats. 1855, p. 171, Sec. 9. The operative words of a release in a simple quitclaim deed are "remise, release, and quitclaim." When the word

"grant" is hereafter employed, or when the words "grant, bargain, and sell" have heretofore been employed, the operation of the conveyance will be not merely to release but to transfer any interest which the grantor possessed at the execution of the deed.—*Touchar* vs. *Crow*, 25 Cal., p. 160; *Muller vs. Boggs*, 25 Cal., p. 186.

Am
What the
term
"incum-
brances"
embraces.

1114. The term "incumbrances" includes taxes and assessments; also, attachment, judgment, and execution liens; also, vendors', mechanics', and mortgage liens; also, all other debts or demands which are liens upon real property.

Lineal and
collateral
warrantees
abolished.

1115. Lineal and collateral warrantees, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law.

NOTE.—Stats. 1855, p. 171, Sec. 8.

CHAPTER III.

TRANSFER OF PERSONAL PROPERTY.

ARTICLE I. MODE OF TRANSFER.

II. WHAT OPERATES AS A TRANSFER.

III. GIFTS.

ARTICLE I.

MODE OF TRANSFER.

SECTION 1135. When must be in writing.

1136. Transfer by sale, etc.

1135. An interest in a ship, or in an existing trust, can be transferred only by operation of law, or by a

written instrument, subscribed by the person making the transfer, or by his agent. When must be in writing.

NOTE.—This provision was intended to settle a doubtful question. The uniform language of the authorities is, that a bill of sale is the customary and proper mode of transfer. Agreements for sale are regulated by the Title on Sale.

1136. The mode of transferring other personal property by sale is regulated by the Title on that subject, in Division Third of this Code. Transfer by sale, etc.

ARTICLE II.

WHAT OPERATES AS A TRANSFER.

SECTION 1140. Transfer of title under sale.

1141. Transfer of title under executory agreement for sale.

1142. When buyer acquires better title than seller has.

1140. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not. Transfer of title under sale.

NOTE.—In Shepherd's Touchstone, p. 224, the common law rule is given as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, first, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or, secondly, all; or, thirdly, part of the money is paid in hand; or, fourthly, I give earnest money, albeit it be but a penny, to the seller; or, lastly, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for payment—in all these cases there is a *good bargain and sale of the thing to alter the property thereof*. In the *first* case, I may have an action for the thing and the seller for his money; in the *second* case, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought and the seller for the residue of the money; in the *fourth* case, where earnest is given, we may have reciprocal remedies, one against another; in the *last* case, the seller may sue for his money." In Noy's

Maxims, p. 87, the rule is given thus: "In all agreements there must be *quid pro quo presently*, except a day be expressly given for the payment, or else *it is nothing but communication*. * * * If the bargain be that you shall give me ten pounds for my horse, and you give me one penny in earnest, which I accept, *this is a perfect bargain*; you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is four pounds, and you say you will give me four pounds and do not pay me presently, you cannot have her afterwards without I will, *for it is no contract*; but if you begin directly to tell your money, if I sell her to another you shall have your action on the case against me. * * * If I sell my horse for money I may keep him until I am paid, but I cannot have an action of debt until he be delivered; *yet the property of the horse is by the bargain in the bargainee or buyer*; but if he presently tender me the money, and I refuse it, he may take the horse or have an action of detinue; and if the horse die in my stables between the bargain and delivery, I may have an action of debt for the money, because by the bargain the property was in the buyer." Says Mr. Benjamin, in his late and valuable work on Sales of Personal Property, p. 218: "The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception. The maxim of Noy that unless the money be paid 'presently' there is no sale, except a day be expressly given for payment, as exemplified in the supposed case of a sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days, the actual payment of the price, but it has since been held to be the purchaser's obligation to pay the price, where nothing shows a contrary intention." In *Simmons vs. Swift*, 5 B. and C., p. 862, it is said that "generally, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." In *Dixon vs. Yates*, 5 Ad. and El., pp. 313, 340, it was held to be clear that by the law of England the sale of a specific chattel passed the property in it to the vendee without delivery; that "where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract

itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."—*Tarling vs. Baxter*, 6 B. and C., p. 360; *Hinde vs. Whitehouse*, 7 East., p. 558; *Martindale vs. Smith*, 1 Q. B., p. 389; *Calcutta Co. vs. De Mattos*, 32 L. J. Q. B., p. 322; *Wood vs. Bell*, 6 E. and B., p. 355; *Joyce vs. Swann*, 17 C. B. (N. S.), p. 84; *Chambers vs. Miller*, 10 C. B. (N. S.), p. 125. In *Tarling vs. Baxter*, 6 B. and C., p. 360, the rule of law was stated thus: "Where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee."—*Gilmour vs. Supple*, 11 Moore P. C., p. 566; *McCandlish vs. Newman*, 22 Penn. St., p. 460; *Kimberly vs. Patchin*, 19 N. Y., p. 330; *Wooster vs. Sherwood*, 25 N. Y., p. 278. If goods are sold while mingled with others, by number, weight, or measure, the sale is not complete, and the title remains in the seller.—*McLaughlin vs. Piatti*, 27 Cal., p. 451. As to what amounts to a segregation, see *Adams vs. Gorham*, 6 Cal., p. 68; *Horr vs. Baker*, 6 Cal., p. 489; *Horr vs. Baker*, 8 Cal., p. 603. As to what does not, see *McLaughlin vs. Piatti*, 27 Cal., p. 451. As to what may or may not, see *Smith vs. Friend*, 15 Cal., p. 124.

1141. Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the Chapter upon Offer of Performance.

Transfer
of title
under
executory
agreement
for sale.

NOTE.—The rules upon the subject of sale of chattels conditionally, are stated by Blackburn as follows: *First*—Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or as it is sometimes worded, into a deliverable

state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. *Secondly*—Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things, also, shall be a condition precedent to the transfer of the property, although the individual goods are to be ascertained, and they are in the state in which they ought to be accepted. “To these rules,” says Mr. Benjamin, (Benjamin on Sales of Personal Property, p. 22,) “may be added, *Thirdly*—Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.” For an elaborate review of the English and American cases upon the subject, see Benjamin on Sales of Personal Property, pp. 221–240; see Secs. 1485 to 1505, post, inclusive, and notes.

When
buyer
acquires
better title
than seller
has.

1142. Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind, the transfer made by him.

NOTE.—Fassett vs. Smith, 23 N. Y., p. 252; Brower vs. Peabody, 13 id., p. 121; Smith vs. Lynes, 5 id., p. 41; Beavers vs. Lane, 6 Duer, p. 236; Saltus vs. Everett, 20 Wend., p. 267.

ARTICLE III.

GIFTS.

SECTION 1146. Gifts defined.

1147. Gift, how made.

1148. Gift not revocable.

1149. Gift in view of death, what.

SECTION 1150. When gift presumed to be in view of death.

1151. Revocation of gift in view of death.

1152. Effect of will upon gift.

1153. When treated as legacy.

1146. A gift is a transfer of personal property, ^{Gifts defined.}
made voluntarily, and without consideration.

NOTE.—Bouvier defines a gift to be “the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, who accepts it without any consideration.” A gift of personal chattels may be made verbally or in writing.—2 Black Com., p. 441. The transfer must be without consideration.—2 Black. Com., p. 440; Benjamin on Sales of Personal Property, p. 3. Otherwise it changes the contract into a sale.—Id.

1147. A verbal gift is not valid, unless the means ^{Gift, how made.}
of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

NOTE.—To perfect a gift there must be a delivery by the donor, and an acceptance by the donee.—Don vs. Gould and Curry S. M. Co., 31 Cal., p. 629; Richardson vs. McNulty, 24 Cal., p. 345; 2 Kent's Com., p. 354; 1 Beav., p. 605; 1 Parsons on Contracts, p. 234. This doctrine is too well settled to be questioned.—Woodruff vs. Cook, 25 Barb., p. 505; Hunter vs. Hunter, 19 id., p. 631; Huntingdon vs. Gilmore, 14 id., p. 243; Noble vs. Smith, 2 Johns., p. 52; Grangiac vs. Arden, 10 id., p. 293; Cook vs. Husted, 12 id., p. 188. But the cases from which the strictness of the rule has been derived, Irons vs. Smallpiece, 2 B. & Ald., p. 551, and others, are not recognized as good authority in England in respect to gifts not in view of death.—Winter vs. Winter, 4 Law Times, (N. S.), p. 639; 101 Eng. C. L., p. 997; Lunn vs. Thornton, 1 C. B., p. 381; Ward vs. Audland, 16 M. & W., p. 870, per Parke, B. The delivery may be constructive.—Carradine vs. Collins, 7 S. & M., p. 428; Donnel vs. Donnel, 1 Head, p. 267; Pope vs. Randolph, 13 Ald., p. 214; 1 Parsons on Contracts, p. 235.

Gift not
revocable.

1148. A gift, other than a gift in view of death, cannot be revoked by the giver.

NOTE.—A gift between the living, when completed, passes the title to the thing, so that it cannot be recovered back by the giver.—7 Taunt., p. 231; 3 Binn., p. 366; 1 Parsons on Contracts, p. 235. If the gift be prejudicial to existing creditors, it is void as to them; but it is not void as to subsequent creditors, unless made with a fraudulent purpose.—1 Parsons on Contracts, p. 235; Thomson vs. Dougherty, 12 S. & R., p. 448; Hudnal vs. Wilder, 4 McCord, p. 294; Sexton vs. Wheaton, 8 Wheat., p. 229; Clark vs. Depen, 25 Penn. St., p. 509; Hawkins vs. Moffit, 10 B. Mon., p. 81.

Gift in view
of death,
what.

1149. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

NOTE.—“These gifts,” says Mr. Parsons, “can be made only by a person by whom death is believed, on reasonable grounds, to be very near, and who makes the gift in view of and because of his approaching death.”—1 Parsons on Contracts, p. 236. The thing given must be personal property.—3 Binn., p. 370. There must be a delivery, either to the donee or some person for him.—3 Binn., p. 370; Drury vs. Smith, 1 P. Wms., p. 404; Ward vs. Turner, 2 Ves., p. 431. 1 Parsons on Contracts, p. 236. There is, perhaps, no limit in law to the extent of a gift made in contemplation of death.—Meach vs. Meach, 24 Vt., p. 591; Dresser vs. Dresser, 46 Me., p. 48; but see Headly vs. Kirby, 18 Penn. St., p. 326. Gifts *causa mortis* are void as against existing creditors.—1 Parsons on Contracts, p. 237.

When gift
presumed
to be in
view of
death.

1150. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

NOTE.—Merchant vs. Merchant, 2 Bradf., p. 432.

Revoca-
tion of gift
in view of
death.

Ans
1151. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence

of any event which would operate as a revocation of a will made at the same time.

NOTE.—A gift made in view of death may be revoked during the life of the donor—and this even where the gift was completed by delivery and acceptance.—1 Parsons on Contracts, p. 237. In *Jones vs. Selby* (Prec. Ch., p. 300) such a gift was put on the same footing as a will in this respect. This case was decided one hundred and fifty years ago; but, says Mr. Parsons, the “rule of *Jones vs. Selby* has never been shaken.”—1 Parsons on Contracts, p. 237; see also upon this point *Merchant vs. Merchant*, 2 Bradf., p. 432; 7 Taut., p. 231; 3 Binn, p. 366. Such a gift is revoked by recovery or escape from peril.—*Staniland vs. Willott*, 3 Macu. & G., p. 664; or by the occurrence of events which would operate as a revocation of a will. *Bloomer vs. Bloomer*, 2 Bradf., p. 339.

1152. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift. Effect of will upon gift.

1153. A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver. When treated as legacy.

NOTE.—It is subject to the debts of the donor upon a deficiency of assets.—1 P. Wms., p. 405. But it does not fall within an administration, nor require any act in the executors to perfect a title in the donee.—Ross. Leg., p. 26.

CHAPTER IV.

RECORDING TRANSFERS.

ARTICLE I. WHAT MAY BE RECORDED.

II. MODE OF RECORDING.

III. PROOF AND ACKNOWLEDGMENTS OF INSTRUMENTS.

IV. EFFECT OF RECORDING OR OF THE WANT THEREOF.

ARTICLE I.

WHAT MAY BE RECORDED.

SECTION 1158. What may be recorded.

1159. Judgments may be recorded without acknowledgment.

SECTION 1160. Letters patent may be recorded without acknowledgment.

1161. Instruments must be acknowledged, except, etc.

1162. Same.

1163. Instruments executed under power of attorney not to be recorded until power is filed.

1164. Transfers in trust, etc.

What
may be
recorded.

1158. Any instrument or judgment affecting the title to or possession of real property may be recorded under this Chapter.

NOTE.—For construction of registration laws generally see: *Woodworth vs. Gutzman*, 1 Cal., p. 203; *Call vs. Hastings*, 3 Cal., p. 179; *Mesick vs. Sunderland*, 6 Cal., p. 279; *Dennis vs. Burnett*, 6 Cal., p. 670; *Bird vs. Dennison*, 7 Cal., p. 297; *Chamberlain vs. Bell*, 7 Cal., p. 292; *Hunter vs. Mason*, 12 Cal., p. 363; *Pixley vs. Huggins*, 15 Cal., p. 127; *Smith vs. Dall*, 13 Cal., p. 510; *Jones vs. Martin*, 16 Cal., p. 165; *McCabe vs. Grey*, 20 Cal., p. 509; *Wallace vs. Moody*, 26 Cal., p. 387; *Fogarty vs. Sawyer*, 23 Cal., p. 570; *Page vs. Rogers*, 31 Cal., p. 293.

Judgments
may be
recorded
without
acknowledgment.

1159. Judgments affecting the title to or possession of real property, authenticated by the certificate of the Clerk of the Court in which such judgments were rendered, may be recorded without acknowledgment or further proof.

Letters
patent may
be recorded
without
acknowledgment.

1160. Letters patent from the United States or from the State of California, executed and authenticated pursuant to existing law, may be recorded without acknowledgment or further proof.

Instruments
must be
acknowledged,
except, etc.

1161. Before an instrument may be recorded, unless it belongs to the class provided for in either Sections 1159, 1160, 1202, or 1203, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its President or Secretary, or proved by a subscribing witness, and the acknowledgment or proof certified in the manner prescribed by Article III of this Chapter.

1162. An instrument proved and certified pursuant to Sections 1198 and 1199 may be recorded in the proper office if the original is at the same time deposited therein to remain for public inspection, but not otherwise. Same.

put 1163. An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office. Instruments executed under power of attorney not to be recorded until power is filed.

1164. Transfers of property in trust for the benefit of creditors, and transfers or liens on property by way of mortgage, are required to be recorded in the cases specified in the Titles on the special relation of DEBTOR AND CREDITOR, and the CHAPTER ON MORTGAGES, respectively. Transfers in trust, etc.

1165 added

ARTICLE II.

MODE OF RECORDING.

SECTION 1169. In what office. •

1170. Instrument, when deemed recorded.

1171. Books of record.

1172. Duties of Recorder.

1173. Transfer of vessels.

1169. Instruments entitled to be recorded must be recorded by the County Recorder of the county in which the real property affected thereby is situated. In what office.

over 1170. An instrument is recorded when duly acknowledged or proved, certified, and deposited in the Recorder's office with the proper officer, and by him filed for record, ~~by noting thereon such filing, with the minute, hour, day and year thereof, and subscribing the same~~ Instrument when deemed recorded.

1171. Grants, absolute in terms, are to be recorded in one set of books, and mortgages in another. Books of record.

Duties of
Recorder.

1172. The duties of County Recorders, in respect to recording instruments, are prescribed by the Political Code.

Transfer of
vessels.

1173. The mode of recording transfers of ships registered under the laws of the United States is regulated by Acts of Congress.

ARTICLE III.

PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

SECTION 1180. By whom acknowledgments may be taken in this State.

1181. Same.

1182. By whom taken without the State.

1183. By whom taken without the United States.

1184. Deputy can take acknowledgment.

1185. Requisites for acknowledgments.

1186. Acknowledgment by married women.

1187. Same.

1188. Officer must indorse certificate.

1189. General form of certificate.

1190. Form of acknowledgment by corporation.

1191. Form of certificate of acknowledgment by married women.

1192. Form of certificate of acknowledgment by attorney in fact.

1193. Officers must affix their signatures.

1194. Certificate of authority of Justices in certain cases.

1195. Proof of execution, how made.

1196. Witness must be personally known to officer.

1197. Witness must prove, what.

1198. Handwriting may be proved, when.

1199. Evidence must prove, what.

1200. Certificate of proof.

1201. Officers authorized to do certain things.

1202. When instrument is improperly certified, party may have action to correct error.

1203. In certain cases, parties interested may obtain judgment of proof of an instrument.

1204. Effect of judgment in such action.

1205. Conveyances heretofore made to be governed by then existing laws.

1206. Recording, and as evidence, to be governed by then existing laws.

1180. The proof or acknowledgment of an instrument may be made at any place within this State before a Justice or Clerk of the Supreme Court.

By whom
acknowl-
edgments
may be
taken in
this State.

1181. The proof or acknowledgment of an instrument may be made in this State within the city, county, or district for which the officer was elected or appointed, before either:

Same.

1. A Judge or Clerk of a Court of record; or,
2. A Mayor or Recorder of a city; or,
3. A Court Commissioner; or,
4. A County Recorder; or,
5. A Notary Public; or,
6. A Justice of the Peace.

NOTE.—Hopkins vs. Delany, 8 Cal., p. 85. A Deputy County Recorder may take and certify acknowledgments.—Muller vs. Boggs, 25 Cal., p. 175. And the reasoning of the case cited is equally applicable to Deputy Clerks. (See Sec. 1184, where the power is expressly conferred upon deputies.) A Justice of the Peace may take and certify an acknowledgment within his county without regard to the locality of the land conveyed, and though it is situated in another county.—Colton vs. Seavey, 22 Cal., p. 496.

1182. The proof or acknowledgment of an instrument may be made without this State, but within the United States, and within the jurisdiction of the officer, before either:

By whom
taken
without
the State.

1. A Justice, Judge, or Clerk of any Court of record of the United States; or,
2. A Justice, Judge, or Clerk of any Court of record of any State; or,
3. A Commissioner appointed by the Governor of this State for that purpose; or,
4. A Notary Public; or,
5. Any other officer of the State where the acknowledgment is made authorized by its laws to take such proof or acknowledgment.

NOTE.—The word "State," by the provisions of Subdivision 12 of Sec. 14 of this Code, includes "Ter-

ritory." See *Lord vs. Sherman*, 2 Cal., p. 498, for a construction of the Act of April sixteenth, eighteen hundred and fifty. A Master in Chancery is not authorized to take the acknowledgment.—*Kimball vs. Semple*, 25 Cal., p. 440.

By whom
taken
without the
United
States.

am
1183. The proof or acknowledgment of an instrument may be made without the United States before either:

1. A Minister, Commissioner, or Charge d'Affaires of the United States resident and accredited in the country where the proof or acknowledgment is made; or,

2. A Consul or Vice Consul of the United States resident in the country where the proof or acknowledgment is made; or,

3. A Judge of a Court of record of the country where the proof or acknowledgment is made; or,

4. Commissioners appointed for such purposes by the Governor of the State, pursuant to special statutes; or,

5. A Notary Public.

NOTE.—In *Mott vs. Smith*, 16 Cal., p. 533, it was held that the general designation in the fourth section of the Act of April sixteenth, eighteen hundred and fifty, as to conveyances, of *any* Notary Public or *any* Consul of the United States, embraced Consuls and Notaries of every grade, whether Consul General or Vice Consul, or whether principal or inferior Notary.

Deputy can
take
acknowledgment.

1184. When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

NOTE.—*Muller vs. Boggs*, 25 Cal., p. 175, and note to Sec. 1181.

Requisites
for
acknowledgments.

1185. The acknowledgment of an instrument must not be taken, unless the officer taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in

and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the President or Secretary of such corporation.

NOTE.—See note to Sec. 1191.

1186. The acknowledgment of a married woman to an instrument purporting to be executed by her, must not be taken, unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

Acknowledgment by married women.

NOTE.—Kendall vs. Miller, 9 Cal., p. 591.

1187. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last section; but such conveyance has no validity until so acknowledged.

Same.

NOTE.—A deed by a married woman, not acknowledged, is void.—Ewald vs. Corbett, 32 Cal., p. 493.

1188. An officer taking the acknowledgment of an instrument must indorse thereon a certificate substantially in the forms hereinafter prescribed.

Officer must indorse certificate.

NOTE.—The certificate is primary evidence of the official character of the person by whom it is given.—Mott vs. Smith, 16 Cal., p. 533; see Code of Civil Procedure, Sec. 1963. The purpose of this certificate is to entitle the deed to be recorded, and to be read in evidence, without further proof.—Fogarty vs. Finley, 10 Cal., p. 239.

1189. The certificate of acknowledgment, unless it is otherwise in this Article provided, must be substantially in the following form:

General
form of
certificate.

STATE OF —, }
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name and quality of the officer], personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument, and acknowledged to me that he [or they] executed the same.

NOTE.—The acknowledgment should show that the officer knew the person either of his own knowledge, or from proof of his identity, and that such person acknowledged to him that he executed the deed.—*Henderson vs. Grewell*, 8 Cal., p. 581. The omission alone of the word "personally" was held not to invalidate the acknowledgment.—*Hopkins vs. Delany*, 8 Cal., p. 85. If the certificate state that the person making the acknowledgment "was proved to be the person" who executed the instrument, it must also state that the proof was "on the oath of" a witness, giving his name. *Kimball vs. Semple*, 25 Cal., p. 440; *McMinn vs. O'Connor*, 27 Cal., p. 238; *Fogarty vs. Finley*, 10 Cal., p. 239. A certificate in form substantially as follows: "Personally appeared, etc., A. B., known to me to be the person described in, and who executed the same freely and voluntarily, and for the uses and purposes therein mentioned," is insufficient. It does not state the fact of acknowledgment.—*Bryan vs. Ramirez*, 8 Cal., p. 461; *Henderson vs. Grewell*, 8 Cal., p. 584; *Stanton vs. Button*, 2 Conn., p. 527; *Pendleton vs. Button*, 3 Conn., p. 406. A certificate as follows: "Before me, etc., personally appeared A. B. C., to be the individual described in and who executed it, etc.," is bad, there being no statement upon the personal knowledge of the officer that the party making the acknowledgment is the person who executed it.—*Wolf vs. Fogarty*, 6 Cal., p. 224; *Kelsey vs. Dunlap*, 7 Cal., p. 160; *Fogarty vs. Finley*, 10 Cal., p. 239.

1190. The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

Form of
acknowledgment
by corporation.

STATE OF —, }
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name and quality of the officer], personally appeared —, known to me [or proved to

me on the oath of —] to be the President [or the Secretary] of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

1191. The certificate of acknowledgment by a married woman must be substantially in the following form:

STATE OF —, }
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name and quality of the officer], personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument, described as a married woman; and upon an examination without the hearing of her husband I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

Form of
certificate
of acknowl-
edgment
by married
women.

NOTE.—“There must be a privy examination.”—Kendall vs. Miller, 9 Cal., p. 591. This decision is based upon the law as it existed prior to the adoption of the Codes, which required the married woman to be examined “apart from” her husband. The Court also say that the certificate was not given by the proper officer. The certificate must state that the contents of the instrument were explained to her, otherwise it is defective.—Pease vs. Barbiers, 10 Cal., p. 436. The deed of a married woman, not acknowledged in the manner required by law, is void. Ewald vs. Corbett, 32 Cal., p. 493. But a substantial conformity with law is all that is required; hence the omission of the words “undue influence” from the acknowledgment, does not render it invalid.—Goodè vs. Smith, 13 Cal., p. 81. And a certificate which stated that the wife was made acquainted with the contents of the instrument, but omitted to state that this was done by the certifying officer, or any particular person, was held valid in Jansen vs. McCahill, 22 Cal., p. 22. Defective deeds and acknowledgments of a married woman cannot be reformed in chancery.—Selover vs. A. R. Commercial Company, 7 Cal., p. 266. For the act of the married woman must be perfectly free from restraint or compulsion.—Barrett vs. Tewksbury, 9 Cal., p. 13.

1192. The certificate of acknowledgment by an attorney in fact, must be substantially in the following form:

Form of
certificate
of acknowl-
edgment
by attorney
in fact.

STATE OF —, } ss.
County of —.

On this — day of —, in the year —, before me [here insert the name and quality of the officer,] personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument as the attorney in fact of —, and acknowledged to me that he subscribed the name of — thereto as principal, and his own name as attorney in fact.

NOTE.—In *Talbert vs. Stewart*, 39 Cal., p. 602, the acknowledgment was in the following form:

"STATE OF CALIFORNIA, }
County of Sacramento. }

"On the twenty-second day of October, A. D. eighteen hundred and fifty, personally appeared before me, a Notary Public in and for said county, John A. Sutter, by his attorney in fact, John S. Fowler, known to me to be the person who executed the within instrument of writing, who acknowledged to me that he signed, sealed, and delivered the same as his voluntary act, and for the uses and purposes therein mentioned.

"Witness, etc."

This was held to be sufficient as the acknowledgment of Fowler, the attorney in fact of Sutter.

Officers
must affix
their
signatures.

1193. Officers taking and certifying acknowledgments or proof of instruments for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also, their seals of office, if by the laws of the State or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.

NOTE.—*Mott vs. Smith*, 16 Cal., p. 533. In *Ingholdsby vs. Juan*, 12 Cal., p. 564, it was held that a County Clerk may take and certify an acknowledgment to a deed, although he has no seal of office—that the power of the Clerk was never intended to be made to depend upon the fact of his having procured a seal, or of the care with which he preserved it.

1194. The certificate of proof or acknowledgment, if made before a Justice of the Peace, when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the Clerk of the county in which the Justice resides, setting forth that such Justice, at the time of taking such proof or acknowledgment, was authorized to take the same, and that the Clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.

Certificate of authority of Justices in certain cases.

1195. Proof of the execution of an instrument, when not acknowledged, may be made either:

Proof of execution, how made.

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in Section 1198.

1196. If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.

Witness must be personally known to officer.

1197. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.

Witness must prove, what.

1198. The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

Handwriting may be proved, when.

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are non-residents of the State; or,
3. When the place of their residence is unknown to

Same. the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or, • ,

4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve the subpoena or attachment; or,

5. In case of the continued failure or refusal of the witness to testify, for the space of one hour, after his appearance.

Evidence
must prove,
what.

1199. The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,

2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,

3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and,

4. The place of residence of the witness; and,

5. That the witness testifying knew the signature of the person who executed the instrument, and that his signature is genuine.

Certificate
of proof.

1200. An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.

NOTE.—No particular form is necessary. If to a certificate of proof by a subscribing witness of the execution of a deed the witness adds his signature, and

the officer adds the usual jurat to an affidavit, such additions do not vitiate the certificate, if, without them, it shows a substantial compliance with the statute.—
Whitney vs. Arnold, 10 Cal., p. 531.

1201. Officers authorized to take the proof of instruments are authorized in such proceedings: Officers authorized to do certain things.

1. To administer oaths or affirmations, as prescribed in Section 2093, CODE OF CIVIL PROCEDURE;

2. To employ and swear interpreters;

3. To issue subpoena, as prescribed in Section 1986, CODE OF CIVIL PROCEDURE;

4. To punish for contempt, as prescribed in Sections 1991, 1993, 1994, CODE OF CIVIL PROCEDURE.

The civil damages and forfeiture to the party aggrieved are prescribed in Section 1992, CODE OF CIVIL PROCEDURE.

1202. When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the District Court to obtain a judgment correcting the certificate. When instrument is improperly certified, party may have action to correct error.

1203. Any person interested under an instrument entitled to be proved for record may institute an action in the District Court against the proper parties to obtain a judgment proving such instrument. In certain cases, parties interested may obtain judgment of proof of an instrument.

1204. A certified copy of the judgment in a proceeding instituted under either of the two preceding sections, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with like effect as if acknowledged. Effect of judgment in such action.

1205. The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this Code goes into effect, executed, acknowledged, proved, or recorded is not affected by anything contained in this Chapter, Conveyances heretofore made to be governed by then existing laws.

but depends for its validity and legality upon the laws in force when the act was performed.

Recording,
and as
evidence,
to be
governed
by then
existing
laws.

1206. All conveyances of real property made before this Code goes into effect, and acknowledged or proved according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be recorded in the same manner and with the like effect, as conveyances executed and acknowledged in pursuance of this Chapter.

NOTE.—Call vs. Hastings, 3 Cal., p. 179; Stafford vs. Lick, 7 Cal., p. 479; Robinson vs. McGee, 9 Cal., p. 85.

1207 added

ARTICLE IV.

EFFECT OF RECORDING, OR THE WANT THEREOF.

SECTION 1213. Record, where and to whom notice.

1214. Conveyances to be recorded, or are void, etc.

1215. Conveyance defined.

1216. Powers of attorney, how revoked.

1217. Unrecorded instrument valid between the parties.

NOTE.—The provisions of the various statutes concerning conveyances which relate to the effect as evidence of instruments acknowledged or recorded, have been placed and may be found in the Fourth Part of the Code of Civil Procedure.

Record,
where and
to whom
notice.

1213. Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the Recorder for record, is constructive notice of the contents thereof to subsequent purchaser and mortgagees.

NOTE.—The intention of the registration laws is to protect subsequent purchasers without notice, actual or constructive.—Call vs. Hastings, 3 Cal., p. 183. The doctrine of constructive notice has always been regarded as a harsh necessity, and the statutes which create it have always been subject to the most rigid construction. Chamberlain vs. Bell, 7 Cal., p. 294; Call vs. Hastings, 3 Cal., p. 183.

In Mesick vs. Sunderland (6 Cal., p. 315) it was held that the Recording Act of this State was designed to

establish one system of notices, by which every one would be able to ascertain what incumbrances existed upon real estate, and by affording a convenient depository for liens and conveyances of land (to which all might have access) substitute the constructive notice, thus established by operation of law, in place of all other kinds of notice. That at common law the registry of a deed is not even *prima facie* evidence of title, and imports no notice whatever, and the purchaser is put upon inquiry in every case; that the inconvenience arising from the English rule upon this subject induced the passage of registry laws in every State in the Union, the intention being to do away with all notice other than that given by statute, except, probably, actual notice in fact, attended with such circumstances as amount to fraud on the part of the purchaser.

In *Stafford vs. Lick* (7 Cal., p. 489) Chief Justice Murray, in commenting upon the case of *Mesick vs. Sunderland*, says: "In that (case) we expressly held that the statute did not do away with *notice in fact*, but only constructive notice, as to those instruments required to be recorded, so that the doctrine of notice of title, arising from possession, no longer obtained. But we nowhere said that possession, together with another fact, might not be admitted in evidence for the purpose of establishing fraud or notice in fact. Such, on the other hand, was our understanding of the case; and in the present case we think it would be proper to admit evidence of possession, as a fact tending to establish notice of title, though not a fact from which notice would follow as a conclusion of law." Says Justice Rhodes, in *Fair vs. Stevenot*, 29 Cal., p. 488: "No case has heretofore been before the Court requiring a decision of the precise question now presented. Notice of the existence of a deed is of two kinds—actual or constructive. Neither the cases nor the text writers altogether agree in their classification of notices. In most cases, all descriptions of notices, except positive—those in which the knowledge of the deed is brought directly home to the party—are held to be included among constructive notices; but in others, all notices that are not deduced as conclusive presumptions of law arising from a given state of facts, are considered to fall within the class of actual notices.—*Sto. Eq. Juris.*, Sec. 399; *Dey vs. Dunham*, 2 Johns. Ch. R., p. 182; *Grimstone vs. Carter*, 3 Paige, p. 421; *Jackson vs. Van Valkenberg*, 8 Cow., p. 260; *Tuttle vs. Jackson*, 6

Wend., p. 213; and see, also, *Williamson vs. Brown*, 15 N. Y., p. 354, in which Mr. Justice Selden ably reviews the authorities on this question.

A recorded deed is an instance of constructive notice, and upon proof being made that it has been duly recorded, the presumption of notice to the subsequent purchaser arises, and the presumption is a conclusive presumption of law, and no opposing evidence is admissible. But whether the notice of the unrecorded deed, implied from the fact of possession of the premises by the grantee, may properly be included within the one or the other of the kinds of notice, it could not be maintained, nor is it in any case said that upon proof of such possession the opposite party is precluded, as in the case of the recorded deed, from offering any evidence to repel the implication of notice, nor that the implication arises from the single fact of possession, independent of any other facts in the case. If this be true, the presumption is not a conclusive presumption; and the fact of possession is only evidence tending to prove notice. Neither the recorded deed, in the one case, nor the possession of the grantee of the unrecorded deed in the other, is the ultimate fact, but *notice* is the ultimate fact to be established by the evidence. Upon proof being made of the record of the deed, the notice necessarily results by operation of law; but not so upon proof of possession, for the possession may be taken and held in such various modes, and accompanied by so many qualifying circumstances, that each case must depend upon its own peculiar features, and therefore proof of possession is not of itself decisive without regard to the other facts of the case. This becomes apparent upon noticing one of the many cases that will readily occur to the mind. The general rule is—except in cases of conclusive presumptions, like the recorded deed, actual notice of the deed to the agent of the subsequent purchaser, the recital in his deed of a former deed, etc.—that whatever puts the party upon inquiry, provided inquiry becomes his duty, is in judgment of law notice to him. Take the case where the holder of the unrecorded deed is personally in the open, notorious, and exclusive possession of the premises, and who, upon inquiry being made as to his title, asserts a claim derived from a hostile source; or, the case where the person apparently in possession is subsequently shown to be the servant of the owner, and who refuses to answer any inquiry concerning the title by which he holds; in neither case will notice be implied. And so in every case, where possession in any of its various characters is proven, if

the facts of the case are not sufficiently certain as to time, place, persons, and circumstances, to put the subsequent purchaser upon inquiry; or, if, after having pursued the inquiry with proper diligence he fails to attain the knowledge of the unrecorded deed, notice will not be presumed. Notice, therefore, is the ultimate fact to be proven, and possession is evidence upon that issue, and it may or may not be sufficient, according to the circumstances of the particular case; it being understood, of course, that the open, notorious, and exclusive possession of the prior purchaser is sufficient to put the subsequent purchaser upon inquiry, and from that fact alone notice of the unrecorded deed should be found, unless he shows that he pursued the inquiry with proper diligence, and failed to attain knowledge of the deed.—See *Kendall vs. Lawrence*, 22 Pick., p. 544; *Bell vs. Twilight*, 2 Foster, N. H., p. 518; *McMechan vs. Griffing*, 3 Pick., p. 155; *Williamson vs. Brown*, 15 N. Y., p. 354. It was held in *Hunter vs. Watson*, 12 Cal., p. 376, “that the open, notorious possession of real estate by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee’s title.” And it was so decided, also, in *Stafford vs. Lick*, 7 Cal., p. 489. Mr. Chief Justice Field says, in *Lestrade vs. Barth*, 19 Cal., p. 676: “This possession and occupation were sufficient to put the purchaser upon inquiry as to the interest, legal or equitable, which the defendant held in the premises, and that inquiry should have been made of the defendant thus in the possession and occupation.” It is not said, however, that the possession was per se notice, and if it could be so held the inquiry incumbent upon him would be useless, for he would be chargeable with notice, whether the inquiry could or could not result in a discovery of the real facts of the case. In *Dutton vs. Warschauer*, 21 Cal., p. 627, some of the language of the Chief Justice is broad enough to express the idea that possession amounted to notice, but the context clearly shows, as does the concurring opinion of Mr. Justice Norton, that it was only intended to be said that the possession of the defendant in the case, open, notorious, and exclusive as it was found to have been, was sufficient to put the subsequent purchaser upon inquiry as to the interest held by the defendant.

Says the same learned Justice, in delivering the opinion of the Court in *Smith vs. Yule*, 31 Cal., p. 183: “The ground upon which the holder of the unrecorded conveyance is permitted to prevail over a subsequent purchaser who has recorded his conveyance according

to statute, is that it was fraudulent in him to take and register a conveyance to the prejudice of the known title of another. And as fraud will not be presumed, but must be proven, the notice, whether actual or constructive, of the unrecorded conveyance, must be clearly shown before the exception established by the Courts to the Registration Act will be permitted to prevail. Inquiry does not become a duty where the apparent possession is consistent with the title appearing of record. The subsequent purchaser cannot be said in such case to have either neglected or refused to make inquiry for a title not appearing of record, for none was suggested by the apparent possession, and therefore for his failure he cannot be adjudged guilty of fraud. Where the vendor is in the apparent possession, the subsequent purchaser, finding the title of record in the vendor, is put upon no further inquiry, because the possession appears to be according to the title; and if at the same time another person is also in possession, there is no presumption of title in him inconsistent with that found in the vendor. In *Billington vs. Welsh*, 5 Bin., p. 132, the vendor sold by parol a part of a tract of land, and put the vendee in possession, and retained possession of the remainder of the tract; and it was held that there was nothing to distinguish the possession of the vendee from that of the vendor, it would not impart notice to the subsequent purchaser. The vendor had erected a forge, gristmill, and sawmill, with a number of houses such as are usually connected with works of that kind, and the vendee had possession of only a small portion of land at no great distance from the iron works; and the Court thought that 'it would naturally occur to a person noticing the forge, mills, and adjacent buildings and inclosures that they all belonged to the proprietors of the works.' This leads us to the only remaining point made by the defendants on the reargument that we shall notice. It is insisted that the possession of the first vendee must be not only open and notorious, but also exclusive. This appears to have been the view of this Court in all the later cases.—See *Lestrade vs. Barth*, 19 Cal., p. 675; *Dutton vs. Warschauer*, 21 Cal., p. 627; *Fair vs. Stevenot*, 29 Cal., p. 486. And the doctrine is very uniformly sustained by current authority.—*McMechan vs. Griffing*, 3 Pick., p. 149; *Kendall vs. Lawrence*, 22 Pick., p. 542; *Hawrick vs. Powell*, 5 Bin., p. 132; *Hewes vs. Wiswell*, 8 Greenleaf, p. 98; *Butler vs. Stevens*, 26 Maine, p. 484; *Le Neve vs. Le Neve*, 2 Lead. Cases in Eq. The regret has often

and justly been expressed that the plain rule of the statute was ever departed from, or that, if any exception was made, it had not been confined to cases of actual notice brought directly home to the persons to be charged; but as it has been made to include notices implied from the possession of the prior purchasers, the remedy, if any is needed, is with the Legislature; but the Court will confine the exception to cases of open, notorious, and exclusive possession, to the exclusion, at least, of the grantor. The subsequent purchaser is not justly chargeable with fraud in failing to make inquiry for a prior unrecorded conveyance, unless there is some fact or circumstance apparent to his observation calculated to excite the suspicion of a prudent man dealing with the property, that a prior conveyance had been made. The existence of such a conveyance would not be suggested by the possession of a third person, while the vendor held the title appearing of record, and was in the apparent possession. The notice is limited by the terms of the section to *subsequent* purchasers and mortgagees.—Dennis vs. Burritt, 6 Cal., p. 670; Rose vs. Munie, 4 Cal., p. 173; Chamberlain vs. Bell, 7 Cal., p. 294; McCabe vs. Grey, 20 Cal., p. 516."

WHAT WILL IMPART NOTICE.—A *Sheriff's duplicate certificate* of sale, deposited by the Sheriff with the Recorder of the proper county, indorsed "filed," recorded in the Book of Deeds, and regularly indexed as a deed, and afterwards placed in a file of recorded deeds, where it remained for ten years before the trial, was held in Page vs. Rogers, 31 Cal., p. 293, to impart notice to subsequent purchasers.

The record of a deed acknowledged before an officer not authorized to take acknowledgments, copied into a proper book of record prior to the passage of the Act of April thirtieth, eighteen hundred and sixty, "supplementary to an Act entitled an Act concerning conveyances," was, in Wallace vs. Moody, 26 Cal., p. 387, held to impart notice of its contents to purchasers and incumbrancers subsequent to the passage of the Act. See, also, McMinn vs. O'Conner, 27 Cal., p. 245.

A mortgage containing a power of sale, recorded in the Book of Records of Mortgages, imparts notice of its contents, both as a mortgage and as a power of attorney.—Fogarty vs. Sawyer, 23 Cal., p. 570.

WHAT WILL NOT IMPART NOTICE.—*Executory contracts* recorded, held not to impart notice in Mesick vs. Sunderland, 6 Cal., p. 297.

Description Omitted.—Deed so recorded does not impart notice.—Chamberlain vs. Bell, 7 Cal., p. 292.

Records in Pencil.—Record of a map so made held invalid in *Caldwell vs. Center*, 30 Cal., p. 539.

Defective Acknowledgments.—See note to Sec. 1189.

Want of Acknowledgment.—See *Racouillat vs. Sansevain*, 52 Cal., p. 376.

Conveyances to be recorded, or are void, etc.

1214. Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

NOTE.—The language of the twenty-fourth section of the Recordation Act of eighteen hundred and fifty, as amended in eighteen hundred and fifty-five, is as follows: "Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, and certified in the manner prescribed in this Act to operate as notice to third persons, shall be recorded in the office of the Recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto, without such record." The twenty-sixth section is as follows: "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser in good faith and for valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded." (The principles involved in the sections cited are found in Secs. 1213, 1214, 1215, and 1217 of this Code.)

In considering the proper construction of the twenty-fourth and twenty-sixth sections of the Recordation Act, Mr. Justice Baldwin, in *Hunter vs. Wilson* (12 Cal., p. 373), observes: "That the Legislature designed, in the twenty-fourth section, to hold that the recording of the deed was necessary to give notice of it to third persons, and supposed that the want of such notice invalidated the deed as to them; but that afterwards the twenty-sixth section was inserted, which was intended to qualify and limit the effect of this provision. The twenty-sixth section is taken from the legislation of New York on that subject, and is in the words of a section of a statute of that State. Taking both sections together, it seems evident that the true construc-

tion is, that the failure of a grantee to record a deed does not absolutely and without exception void the deed as to third persons; for, if it did, it is impossible to give effect to the words '*bona fide* purchaser for a valuable consideration.' The failure to register only protects this class of persons. Under the registration laws of England and the American States (which did not contain this limitation) Courts of Equity engrafted this exception, and held, in numerous cases, that the purchaser of lands, knowing them to have been before sold by the vendor, though the deed was not recorded, was not within the protection of the statute. (See 10 Johns., p. 457.) The Irish Registry Act makes no exception or qualification, but the record is the only notice; and, in some of the States—Massachusetts, Maine, and perhaps others—actual notice is the only substitute for the notice by the registry.

"The question arises, who is a *bona fide* purchaser, or what is a *bona fide* purchase? And this inquiry has been the fruitful source of difficulty, and contention, and conflicting decision. *A priori*, it might, perhaps, be considered not a little difficult to say that a party buying land in the possession of another must necessarily be a fraudulent purchaser, especially when he buys with record proof before him of the ownership of his vendor. It could scarcely be held that such a purchaser must necessarily know that the vendor had no title, and that the possessor had. Some of the cases hold that mere possession is actual notice, and will not suffer any proof to be made to the contrary; others, and perhaps the greater number, hold that it is only presumption of notice, which may be rebutted; and others, again, hold that the possession is not so much notice of the title of the holder as a circumstance which should put the purchaser on inquiry, and if he fails to inquire, he is no more protected than if he had inquired and ascertained the fact.

"In New York the cases are by no means harmonious, the earlier cases holding with more strictness to the doctrine of notice than those of a later date. It must be conceded, however, that the authorities, not only in New York, but elsewhere, are overwhelming to the point that possession is proof of notice—whether *prima facie* or absolute, it is not necessary to inquire here—of the title of the possessor. This is the doctrine of the Supreme Court of the United States, and of every State in the Union, with three or four exceptions. It is urged against this array of authority, that this matter of possession is a fact, not a principle; that the fact

must have its force in different States or places, according to circumstances; that this fact in England or Massachusetts, owing to local circumstances, has a significance which is denied by the circumstances prevailing here; that in the older States titles are settled and easily understood, but that the reverse of this stable condition of affairs characterizes our younger and unsettled State; and that, besides this, we have a statute unknown to those States, allowing the purchase of land in adverse possession; that, in addition to this, much of the real estate of the country is held by disputed titles, and no considerable portion by no pretense of it. The force of this argument is conceded; but something may be urged on the other side. Some latitude should probably be indulged in a new State, whose people, hastily gathered together, are, many of them, unfamiliar with their own laws; and it is not strange that, under the peculiar circumstances which surround them, great negligence and laxity in the transaction of business, both in individuals and public officers, prevailed; and hence much that may be attributed to ignorance, carelessness, and accident prevented the preservation and protection of land titles. But, besides this, we do not see enough in these suggestions to induce us to disregard an array of authority so formidable.

"We acknowledge the weight of the consideration of public policy which suggests that land titles should be made to depend upon written and record proof, with few exceptions, and to leave as little to parol proof as possible; and especially do we acknowledge the paramount importance of establishing clear, precise, and definite rules in respect to contracts and property; such rules as furnish of themselves authentic guides to Courts and juries, and give to the citizen certain ideas of his rights, and leave as little as possible to litigation or the discretion of the Judge. But this policy addresses itself to the Legislature, and we cannot give effect to it in this case, in the face of a clear persuasion that the law, as it is written, is otherwise. We must, therefore, hold, in obedience to this authority, that the open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title. To guard against misapprehension, we say that the possession must exist at the time of the acquisition of title or deed of the subsequent vendee, from the common vendor."

A judgment creditor purchasing at his own sale, without notice, is a *bona fide* purchaser within the act.—

Hunter vs. Watson, 12 Cal., p. 363. Judgment creditors of a vendor in a deed, who became such after the execution and delivery of the deed, cannot object that the deed was not on record, unless a sale has been made under such judgment before the deed is recorded. But if a sale under the judgment takes place before such deed is recorded, the purchasers at such sale, without notice, actual or constructive, of the deed, may invoke the protection of the Registry Act.—Pixley vs. Higgins, 15 Cal., p. 127.

1215. The term "conveyance," as used in Sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills. Conveyance defined.

1216. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded, in the same office in which the instrument containing the power was recorded. Powers of attorney, how revoked.

1217. An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Unrecorded instrument valid between the parties.

NOTE.—Based on "Conveyances," Sections 24, 25, 26.—Landers et al. vs. Bolton, 26 Cal., p. 393; see, also, Notes to Sections 1213 and 1214. But it must be borne in mind that the provisions of this section do not apply to conveyances by married women. Such conveyances have no validity, unless duly acknowledged.—See Section 1187.

CHAPTER V.

UNLAWFUL TRANSFERS.

SECTION 1227. Certain instruments void against purchasers, etc.

1228. Not void against purchaser having notice, unless fraud is mutual.

SECTION 1229. Power to revoke, when deemed executed.

1230. Same.

1231. Other provisions.

Certain
instru-
ments void
against
purchasers,
etc.

1227. Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or incumbrancers thereon, is void as against every purchaser or incumbrancer, for value, of the same property, or the rents or profits thereof.

NOTE.—*Smith vs. Morse*, 2 Cal., p. 524. The law is well settled, that a conveyance made with intent to defraud *creditors* is void; though there may have been a full and valuable consideration paid therefor, the fraud taints and vitiates it.—*Swinford vs. Rogers*, 23 Cal., p. 236; 1 Story's Eq., Sec. 369. And it will not be allowed to stand, even as security for advances actually made.—*Goodwin vs. Hammond*, 13 Cal., p. 170. The same rule would seem applicable to conveyances made with intent to defraud *purchasers*, etc. Where the sale and conveyance of property is but one transaction, and the sale is fraudulent as to part of the property, the Court is justifiable in holding the whole transaction fraudulent and void.—*Swinford vs. Rogers*, 23 Cal., p. 236; *McKenty vs. Gladwin*, 10 Cal., p. 228; *Seales vs. Scott*, 13 Cal., p. 78.

Not void
against
purchaser
having
notice,
unless
fraud is
mutual.

1228. No instrument is to be avoided under the last section, in favor of a subsequent purchaser or incumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.

NOTE.—Statutes 1850, p. 266, Sec. 2.

Power to
revoke,
when
deemed
executed.

1229. Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estate, by the person having the power of revocation, in favor of a purchaser or incumbrancer for value, operates as a revocation of the origi-

nal instrument, to the extent of the power, in favor of such purchaser or incumbrancer.

NOTE.—Statutes 1850, p. 266, Sec. 4.

1230. Where a person having a power of revoca- Same.
tion, within the provisions of the last section, is not
entitled to execute it until after the time at which he
makes such a grant or charge as is described in that
section, the power is deemed to be executed as soon
as he is entitled to execute it.

NOTE.—Statutes 1850, p. 266, Sec. 5.

1231. Other provisions concerning unlawful trans- Other provisions.
fers are contained in Part II, Division Fourth, of this
Code, concerning the Special Relations of Debtor and
Creditor.

TITLE V.

HOMESTEADS.

CHAPTER I. *General Provisions.*

II. *Homestead of the Head of a Family.*

III. *Homestead of Other Persons.*

CHAPTER I.

GENERAL PROVISIONS.

SECTION 1237. Homestead, of what it consists.

1238. From what it may be carved.

1239. From what not.

1240. Exempt from forced sale.

1241. Subject to, when.

1242. How conveyed or incumbered.

1243. How abandoned.

1244. Same.

1245. Proceedings on execution against homestead.

1246. Same.

SECTION 1247. Same.

1248. Same.

1249. Same.

1250. Same.

1251. Same.

1252. Same.

1253. Same.

1254. Same.

1255. Same.

1256. Same.

1257. After sale, money equal to homestead exemption protected.

1258. Compensation of appraisers.

1259. Costs.

1260. Who may select homestead, value of.

1261. Head of family defined.

am
 Home-
 stead, of
 what it
 consists.

1237. The homestead consists of a quantity of land, on which the claimant resides, selected as in this Title provided.

NOTE.—Const., Art. XI, Sec. 15; Stats. 1851, p. 296, Sec. 1; 1860, p. 311, Sec. 1; Estate of Delaney, 37 Cal., p. 176; Cooke vs. McChristian, 4 Cal., p. 23; Taylor vs. Hargous, 4 Cal., p. 268; Holden vs. Purney, 6 Cal., p. 234; Moss vs. Warner, 10 Cal., p. 296; Benedict vs. Bunnell, 7 Cal., p. 245; Mann vs. Rogers, 35 Cal., p. 316; Ackley vs. Chamberlain, 16 Cal., p. 181.

Both in the Constitution and in the statute the word "homestead" is used in its ordinary or popular sense; or, in other words, its legal sense is also its popular sense. It represents the dwelling house, at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case it is unlimited by extent merely. It need not be in a compact body; on the contrary, it may be intersected by highways, streets, or alleys. Neither is it circumscribed by fences merely. In respect to quantity, by itself considered, it is unlimited, whether in town or country. In short, the only tests are use and value. The former is both abstract and statutory, the latter statutory only. Whatever is used, being either necessary or convenient, as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead, subject to the statutory limit

as to value. If, however, it is also used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use, independent of the business. If what is actually used as a homestead is of greater value than five thousand dollars, the excess is not homestead, under the law, though so in fact. Further than this, in the way of general definition, it is difficult to go, if not impossible. Whatever lies beyond must find its demonstration in the peculiar facts of the case. The homestead for which the law provides is not one in name merely, but one in fact. The law is founded upon the idea that it is good for the general welfare that every family should have a home, a place to abide in, a castle, where it can find shelter from financial disasters and protection against the pursuit of creditors, who have given credit with the full knowledge that they cannot cross its threshold. But it is not founded upon the idea that every family ought, for the sake of the general good, to be allowed to hold five thousand dollars worth of land free from the touch of honest creditors, provided they reside upon and use some portion of it as a homestead.—*Gregg vs. Bostwick*, 33 Cal., p. 228.

Am

1238. It may be selected by the claimant from any land in the possession of the claimant, or of the husband of the claimant. From what it may be carved.

NOTE.—Stats. 1867-8, p. 116, Secs. 1, 3; *Mann vs. Rogers*, 35 Cal., p. 316. Under the Homestead Laws of this State in force prior to eighteen hundred and sixty-eight, it was held that a homestead could not be carved out of land held in joint tenancy, or by tenancy in common.—*Wolfe vs. Fleischucker*, 5 Cal., p. 244; *Reynolds vs. Pixley*, 6 Cal., p. 165; *Elias vs. Verdugo*, 27 id., p. 418; *Seaton vs. Son*, 32 Cal., p. 481. The statute of eighteen hundred and sixty-eight (Stats. 1867-8, p. 116,) provided that homesteads might be carved out of land held in joint tenancy. In *Spencer vs. Geissman*, 37 Cal., p. 96, the Court held that the homestead right is impressed on the land to the extent of the interest of the claimant in it, and not on the title merely. Under Sec. 1238, subject to the limitation contained in Sec. 1239, the right of selection may be exercised from any land of which the claimant or her husband is possessed. The estate in the land out of which the homestead is carved may be the fee, or such an interest as mere naked possession gives, or any inter-

mediate estate. The possession may be held by the claimant alone, or in common, or in joint tenancy, for possession of any character is sufficient. It is the "home" that is intended to be protected to the extent of the rights which the claimant or her husband has in it.

From what
not.

Am
1239. The husband cannot select a homestead from the separate property of the wife.

NOTE.—The homestead may be selected by either party out of the community property or the separate property of the husband.—*Gee vs. Moore*, 14 Cal., p. 172; *Revalk vs. Cramer*, 8 Cal., p. 66; *Guning vs. Doane*, 22 Cal., p. 638; *Riley vs. Pehl*, 23 Cal., p. 74. But under the provisions of Sec. 1239 the wife alone can impress the homestead character upon her separate property.

Exempt
from forced
sale.

1240. The homestead is exempt from execution or forced sale, except as in this Title provided.

NOTE.—The Constitution (Art. XI, Sec. 15) provides that: "The Legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families." Our homestead laws are enacted to give effect to this provision. A "forced sale" is not synonymous with a "sale on execution," etc. The latter may be, and often is, voluntary in every respect. When the owner consents to a sale under the execution or other legal process, the sale is not forced, but it is as voluntary, within the full import of the term, as it is when he directly effects the sale and executes the conveyance. Its quality, as being voluntary or forced, depends not upon the mode of its execution, but upon the presence or absence of the consent of the owner. If those terms were synonymous, the provision would have been that the homestead shall not be subject to sale under execution or other legal process. The meaning of a sale on execution or other final process is plain, and needs no interpretation, and the word "forced," unless it is to be rejected as insensible, must qualify the phrase with which it is connected. But there can be no question that enforced sale means a sale against the will of the owner. It is apparent that it was not the intent of the framers of the Constitution to prevent the owner or owners of the homestead property from voluntarily alienating, changing, or otherwise affecting it. The homestead was not forced upon him, but he was at

liberty to avail himself of its protection or not, at his election, and if accepted, to waive it at his election—the consent of his wife, if he was a married man, being required in order to secure to her, also, the protection of the homestead exemption.

Where the owner of the homestead consents to a sale under execution or other legal process, it is not a forced sale. It makes no difference in respect to its being forced or voluntary, whether he consents directly to the sale or does the same indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. A foreclosure sale, whether under the power of sale contained in the mortgage or in pursuance of a decree, is not a forced sale within the meaning of the Constitution or the statute.—*Peterson vs. Hornblower*, 33 Cal., p. 277.

A judgment recovered against the husband is not a lien upon the homestead.—*Ackley vs. Chamberlain*, 16 Cal., p. 181. If, while a judgment is standing against the husband, he and wife make a sale of the property, and relinquish the homestead, so that the sale and relinquishment constitute but one transaction, and the homestead does not exceed in value five thousand dollars, the lien of the judgment will not attach; but if the relinquishment is made prior to the sale, the lien will attach.—*Marriner vs. Smith*, 27 Cal., p. 649. An insolvent may appropriate money to the payment of a mortgage upon his homestead, and the transaction will not be held in fraud of creditors.—*Randall vs. Buffington*, 10 Cal., p. 491.

Am
1241. The homestead is subject to execution or forced sale in satisfaction of judgments obtained: Subject to when.

1. Before the "Declaration of Homestead" was filed for record, and which constitute liens upon the land out of which the homestead is carved;

2. On debts secured by mechanics', laborers', or vendors' liens on the land;

3. On debts secured by mortgages upon the land, executed and acknowledged by the husband and wife, or an unmarried claimant;

4. On debts secured by mortgages on the land, exe-

cut and recorded before the "Declaration of Homestead" was filed for record.

NOTE.—Judgments obtained before

DECLARATION OF HOMESTEAD.

A judgment obtained against the husband before the declaration of homestead is filed, becomes a lien upon the homestead, and it may be sold under execution issued on such judgment.—*Bartholomew vs. Hook*, 23 Cal., p. 277; *Noble vs. Hook*, 24 Cal., p. 639. But if the wife, after the judgment is docketed, file a declaration of homestead, she acquires such an interest in the property as enables her to maintain an action against the Sheriff to compel him to exhaust the other property before selling the homestead.—*Bartholomew vs. Hook*, 23 Cal., p. 277. Where a partnership in failing circumstances converts its means into real estate, to be claimed as a homestead by one of the firm, for the purpose of placing those means beyond the reach of creditors, the land is liable to the executions of the creditors. *Bishop vs. Hubbard*, 23 Cal., p. 514.

VENDOR'S LIEN.—The homestead right is subordinate to a vendor's lien existing for the purchase money; but after the homestead right has attached, the husband cannot, without the assent of the wife, charge the land by an agreement to pay interest upon the purchase money.—*McHendry vs. Reilly*, 13 Cal., p. 75.

MORTGAGES MUST BE EXECUTED BY BOTH PARTIES, WHEN.—A mortgage of the homestead, when its value does not exceed five thousand dollars, signed by the husband alone, is void.—*Revalk vs. Cramer*, 8 Cal., p. 66; *Sears vs. Dixon*, 33 Cal., p. 326; *Bowman vs. Norton*, 16 Cal., p. 213; *Lies vs. Daibler*, 12 Cal., p. 327. Nor will such a mortgage become valid by reason of the homestead right being lost by the death of the wife of the mortgagor without children. The debt is not impaired, but stands only on the same level with other debts of the mortgagor.—*Id.* The homestead is not affected by the foreclosure of a mortgage signed by the husband alone.—*Cook vs. Klink*, 8 Cal., p. 347; *Moss vs. Warner*, 10 Cal., p. 296. But where A purchases land of B, and borrows the whole of the purchase money from C, and to secure the payment thereof, mortgages the premises to C, but the wife does not sign the mortgage, the homestead right is subject to the mortgage, the deed and mortgage being but parts of the same transaction.—*Lassen vs. Vance*, 8 Cal., p. 271; *Carr vs. Caldwell*, 10 Cal., p. 380.

MORTGAGES EXECUTED BEFORE FILING DECLARATION.—A new note and mortgage, executed by the husband alone, in place of a prior one given on the homestead before the declaration of homestead was filed, does not continue the old mortgage in life as to the homestead interest beyond the time when it would otherwise be barred by the Statute of Limitations. *Barber vs. Babel*, 36 Cal., p. 11. If a mortgage is given to secure the purchase money of the mortgaged premises, no homestead, impairing the rights of the mortgagee, can be carved out of the property.—*Montgomery vs. Tutt*, 11 Cal., p. 191; *Skinner vs. Beatty*, 16 Cal., p. 158; *Montgomery vs. Middlemiss*, 21 Cal., p. 107.

1242. The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.

How
conveyed
or incum-
bered.

NOTE.—The homestead can only be conveyed in the manner prescribed by law.—*Lies vs. Daibler*, 12 Cal., p. 327; *Poole vs. Gerrard*, 6 Cal., p. 71; *Gee vs. Moore*, 14 Cal., p. 472; *Bowman vs. Norton*, 16 Cal., p. 213; *Guiod vs. Guiod*, 14 Cal., p. 506; *McQuade vs. Whaley*, 31 Cal., p. 526. But a sale or alienation of the homestead, made by the husband alone, is void only as to the homestead value; the excess over that value is, if the homestead was carved out of the separate property of the husband, or the community property, subject to the control and disposition of the husband.—*Sargent vs. Wilson*, 5 Cal., p. 504; *Dorsey vs. McFarland*, 7 Cal., p. 346; *Revalk vs. Kraemer*, 8 Cal., p. 74; *Dunn vs. Tozer*, 10 Cal., p. 167. A contract by a married man for the sale and conveyance of land which is the homestead of himself and wife is not performed by a conveyance executed by himself alone.—*Clarkin vs. Lewis*, 20 Cal., p. 634.

1243. A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

How
abandoned.

1. By the husband and wife, if the claimant is married;
2. By the claimant, if unmarried.

Same. 1244. A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.

Proceedings on execution against homestead. 1245. When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in Section 1241, is levied upon the homestead, the judgment creditor may apply to the County Judge of the county in which the homestead is situated for the appointment of persons to appraise the value thereof.

NOTE.—See *Gary vs. Eastabrook*, 6 Cal., p. 457.

Same. 1246. The application must be made upon a verified petition, showing:

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption.

Same. 1247. The petition must be filed with the Clerk of the County Court.

Same. 1248. A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant, at least two days before the hearing.

Same. 1249. At the hearing the Judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead.

Same. 1250. The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same.

Same. 1251. They must view the premises and appraise the value thereof, and if the appraised value exceeds

the homestead exemption they must determine whether the land claimed can be divided without material injury.

1252. Within fifteen days after their appointment they must make to the Judge a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed. Same.

1253. If, from the report, it appears to the Judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land. Same.

1254. If, from the report, it appears to the Judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution. Same.

1255. At such sale no bid must be received, unless it exceeds the amount of the homestead exemption. Same.

1256. If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant, and the balance applied to the satisfaction of the execution. Same.

Am 1257. The money paid to the claimant is entitled to all the protection against legal process and the voluntary disposition of the husband which the law gives to the homestead. After sale, money equal to homestead exemption protected.

1258. The Court must fix the compensation of the appraisers, not to exceed five dollars per day each for the time actually engaged. Compensation of appraisers.

Costs. 1259. The execution creditor must pay the costs of these proceedings in the first instance; but in the cases provided for in Sections 1253 and 1254 the amount so paid must be added as costs on execution, and collected accordingly.

Who may select homestead, value of. 1260. Homesteads may be selected and claimed:
 1. Of not exceeding five thousand dollars in value by any head of a family;
 2. Of not exceeding one thousand dollars in value by any other person.

Head of family defined. *W* 1261. The phrase, "head of a family," as used in this Title, includes within its meaning:

1. The husband;
2. The wife;
3. Every person who has residing on the premises with him or her and under his or her care and maintenance either:
 - First*—His or her minor child, or the minor child of his or her deceased wife or husband;
 - Second*—A minor brother or sister, or the minor child of a deceased brother or sister;
 - Third*—A father, mother, grandfather, or grandmother;
 - Fourth*—The father, mother, grandfather, or grandmother of a deceased husband or wife;
 - Fifth*—An unmarried sister, or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves.

NOTE.—Stats. 1851, p. 296, Sec. 5; 1862, p. 519, Sec. 3.

CHAPTER II.

HOMESTEAD OF THE HEAD OF A FAMILY.

SECTION 1262. Mode of selection.

1263. Declaration of homestead.

1264. Declaration must be recorded.

Am 1265. Tenure by which homestead is held.

1262. The husband and wife, or either of them, or other head of a family, in the selection of the homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead. Mode of selection.

Am 1263. The "Declaration of Homestead" must contain: Declaration of homestead.

1. A statement of the facts that show the person making it to be the head of a family;
2. A statement that the person making it is residing on the land, and claims it as a homestead;
3. A description of the land;
4. An estimate of its actual cash value.

NOTE.—The declaration may include more than one lot of land, if they are contiguous.—McDonald vs. Badger, 23 Cal., p. 393.

1264. The declaration must be recorded in the office of the Recorder of the county in which the land is situated. Declaration must be recorded.

Am 1265. From and after the time the declaration is filed for record, the land therein described is a homestead; and if the declaration was made by a married person, the land is thereafter by the spouses held in joint tenancy, and on the death of either of the spouses, and subject to no other liability than such as exists or has been created under the provisions of this Title, it descends to and the title at once vests in the survivor. Tenure by which homestead is held.

NOTE.—Estate of Buchanan, 8 Cal., p. 507; Gee vs. Moore, 14 Cal., p. 472; Estate of James, 23 Cal., p. 415;

McQuade vs. Whaley, 31 Cal., p. 526; Baker vs. Babel, 36 Cal., p. 11; Estate of Wixom, 35 Cal., p. 320. •

CHAPTER III.

HOMESTEAD OF OTHER PERSONS.

SECTION 1266. Mode of selection.

1267. Declaration of homestead.

1268. Declaration must be recorded.

1269. Effect of filing for record the declaration of homestead.

Mode of
selection.

1266. Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a "Declaration of Homestead."

NOTE.—The Act of March thirtieth, eighteen hundred and sixty, (Stats. 1860, p. 87), in relation to homesteads of persons not heads of families, provided a cumbrous and expensive system for the selection of such homesteads. The Commissioners could see no reason for making a distinction in this respect between the two classes of homesteads, and therefore substituted the provisions of this Chapter for those of the Act of eighteen hundred and sixty.

Declara-
tion of
homestead

1267. The declaration must contain everything required by the second, third, and fourth subdivisions of Section 1263.

Declara-
tion must
be
recorded.

1268. The declaration must be recorded in the office of the County Recorder of the county in which the land is situated.

Effect of
filing for
record the
declara-
tion of
homestead.

1269. From and after the time the declaration is filed for record, the land described therein is a homestead. .

TITLE VI.

WILLS.

CHAPTER I. *Execution and Revocation of Wills.*II. *Interpretation of Wills.*III. *General Provisions Relating to Wills.*

CHAPTER I.

EXECUTION AND REVOCATION OF WILLS.

SECTION 1270. Who may make a will.

1271. Monomaniac incompetent.

1272. Will, or part thereof, procured by fraud.

1273. Separate property of married women.

1274. What may pass by will.

1275. Who may take by will.

1276. Written will, how to be executed.

1277. Definition of an olographic will.

1278. Witness to add residence.

1279. Mutual will.

1280. Competency of subscribing witness.

1281. Conditional will.

1282. Gifts to subscribing witnesses void. Creditors competent witness.

1283. Witness who is a devisee, and who would be entitled to share of testator's estate if no will, entitled to share to amount of devise.

1284. Will made out of this State.

1285. Will not duly executed, void.

1286. Subsequent change of domicile.

1287. Republication by codicil.

1288. Nuncupative will, how to be executed.

1289. Requisites of a valid nuncupative will.

1290. Proof of nuncupative wills.

1291. Probate of noncupative wills.

1292. Written will, how revoked.

1293. Evidence of revocation.

1294. Revocation by obliteration on face of will.

1295. Revocation of duplicate.

1296. Revocation by subsequent will.

1297. Antecedent not revived by revocation of subsequent will.

SECTION 1298. Revocation by marriage and birth of issue.

1299. Effect of marriage of a man on his will.

1300. Effect of a marriage of a woman on her will.

1301. Contract of sale not a revocation.

1302. Mortgage not a revocation of will.

1303. Conveyance, when not a revocation.

1304. When it is a revocation.

1305. Revocation of codicils.

1306. Afterborn child, unprovided for, to succeed.

1307. Children or issue of children of testator unprovided for by his will.

1308. Share of afterborn child, out of what part of estate to be paid.

1309. Advancement during lifetime of testator.

1310. Death of devisee, being relation of testator, in lifetime of testator, leaving lineal descendants.

1311. Devises of land, how construed.

1312. Will to pass rights acquired after the making thereof.

Who may
make a
will.

1270. Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in Title VII of this Part, being chargeable in both cases with the payment of all the decedent's debts, as provided in the CODE OF CIVIL PROCEDURE.

NOTE.—Stats. 1850, p. 177, Sec. 1. Women may make wills.—Walters vs. Cullen, 2 Brad., p. 354. What estate passes by will.—See Norris vs. Harris, 15 Cal., p. 226; Panaud vs. Jones, 1 Cal., p. 488. Dr. Taylor's rule, as laid down in Med. Jur., p. 658, (ed. 1861), is, by Redfield on the Law of Wills, p. 95, Sec. 13, Sub. 5, said to be as reliable as any for testing the mental capacity of a person. It is as follows: "If a medical man be present when the will is made, he may easily satisfy himself of the state of mind of the testator by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. Medical men have sometimes placed themselves in a serious position by becoming witnesses to wills under these circumstances without first assuring themselves of the actual mental condition of the testator. It would always be a good ground of justification if, at the request of the witness, the testator had been made to repeat substantially the leading provisions of his will from memory. If a dying or sick person (or any other one) cannot do this without prompting or suggestion,

there is reason to believe that he has not a sane and disposing mind." *Hathorn vs. King*, 8 Mass., p. 371, where it was held that being able to recall the particulars of the directions given the scrivener is evidence of testamentary capacity; *Marks vs. Bryant*, 4 Hen. & Munf., p. 91; *Kinne vs. Kinne*, 9 Conn., p. 265, substantially sustain Dr. Taylor's rule; see, also, *Red. Law Wills*, p. 127, and note. It is said, from the best considered cases, that the quantum of understanding necessary to make a will is that the testator should know and understand "*what he is about*." Great care and deliberation are also evidence of sound and disposing mind, especially when the testator was previously habitually insane.—*Red. Law Wills*, p. 124, Sec. 15, Sub. 7, (ed. 1864); *Sloan vs. Maxwell*, 2 Green's Ch., p. 572, where it was held that "*old age*," "*failure of memory*," or "*habitual drunkenness*," will not incapacitate to execute a valid will; *Van Alst vs. Hunter*, Johns. Ch., p. 158; *Lowe vs. Williamson*, 1 Green's Ch., p. 82. Intoxication producing mental oblivion at the time of the execution of the will, incapacitates the testator.—*Red. Law of Wills*, p. 160, et seq. Deaf, dumb, and blind persons may make wills.—*Wier vs. Fitzgerald*, 2 Brad., p. 42. As to old age.—*Marcrook vs. Reynolds*, 2 Brad., p. 360; *Staunton vs. Weatherwax*, 16 Barb., p. 259; *Waring vs. Waring*, 12 Jurist, p. 947; 6 Moore P. C. C., p. 341.

Refn

1271. A person having any insane delusion is incompetent to make a will.

Monomaniac incompetent.

NOTE.—*Stanton vs. Weatherwax*, 16 Barb., p. 259; *Waring vs. Waring*, 12 Jurist, p. 947; 6 Moore P. C. C., p. 341. The bequests must be shown manifestly to have been made under an insane delusion.—*Morgan vs. Boys'* Med. Jur., Taylor, p. 656, 657; *Florey vs. Florey*, 24 Ala., p. 241; *Jenckes vs. Smithfield*, 2 R. I., p. 255; *Townsend vs. Townsend*, 7 Gill., p. 10.

1272. A will, or part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

Will, or part thereof, procured by fraud.

NOTE.—Seq Subd. 2, Sec. 1312, Title XI, Chapter I, Article II of Part III of the "Code of Civil Procedure." A want of free will, particularly that resulting from "duress," "menace," "fraud," or "undue

influence," incapacitates the testator to make a valid will. In support of this proposition, see "Redfield, Law of Wills," pp. 511, 512, and notes; 1 Wms. Exrs., p. 41; Swinburne, Part 2, Sec. 8, p. 54; Lord Donegal's case, 2 Ves. Sen., p. 407, opinion by Lord Hardwicke. Undue influence includes fraud; and a will or bequest procured by such means to be made, is invalid.—See Redfield, Law of Wills, p. 510, et seq. and notes, and cases there cited.

Am
Separate
property of
married
women.

1273. A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be attested, witnessed, and proved in like manner as all other wills.

NOTE.—Stats. 1850, p. 177, Sec. 2; 1865-6, p. 317, Sec. 1; Morrison vs. Bowman, 29 Cal., p. 337; Waters vs. Cullen, 2 Brad., p. 354; Block vs. Cross and Wife, 7 George, (Miss.), p. 549. In this case it was held that the powers of married women over their separate estate applied only to property acquired in that State; and that property acquired by her in another State, is governed in her powers over it by the law of that State. Under the civil law married women executed valid wills. At common law they could only do so with the consent of their husbands. In our country the right of married women to make wills of their separate property, and their interest in community property, is fast obtaining.—See, also, Sec. 162, ante, and note; Sec. 172, ante, and note; see, also, Redfield, Law of Wills, p. 21, Sec. 3, et. seq.

What may
pass by
will.

1274. Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise provided in Sections 1401 and 1402.

NOTE.—All estates which are transmissible, either by operation of law or by the act of the owner, are held divisible; this extends to a possibility, if it is not a naked expectancy, but is coupled with an interest. It extends to all vested estates, even those liable to be defeated by conditions subsequent. This was settled at an early day.—See Pinburz vs. Elkin, 1 P. Wms., pp. 563-566; Red. L. of W., (ed. 1864,) p. 390. One holding as a wrongdoer, seized tortuously, cannot devise any interest in such estate.—Smith vs. Bryan, 12 Ind., p. 11; see

Secs. 1044, 1045, 1046, 1047, ante, as to what may be transferred, and, of course, what may pass by will is included. No limitation to power of disposition by will.—Norris vs. Harris, 15 Cal., p. 226. Will ratifying former gift valid.—(Case of Peralta's will,) Adams vs. Lansing, 17 Cal., p. 629.

Am
1275. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that no corporation can take under a will, unless expressly authorized by statute so to take.

*Who may
take by
will.*
Amended

NOTE.—Swinburne, Wills, Part I, Sec. 2; Godolphin, Part I, Chap. I, Sec. 2. The term "will," as an expression of the final disposition of one's property, is confined to the English law, and those countries which derive their jurisprudence from that source; and that of "testamentum," or "testament," to the Roman civil law and continental writers. It is an ancient practice to allow one to dispose of his property by will, coeval with civilization, so far we know.—Genesis xlviii, 22; Gal. iii, 15; Plutarch's Life of Solon; Roman Law of the Twelve Tables. This did not exist among the ancient Germans, the Spartans under the laws of Lycurgus, nor the Athenians before the time of Solon.—4 Kent's Comm., p. 502, and note. This right, till a comparatively recent period, was exercised in England with great restrictions, even relating to personal property.—2 Blk. Comm., p. 492. Until Stat. of Wills, pp. 32 and 34, Henry VIII, the wife and children were each entitled to claim of the executor one third of the estate. If the testator left only a wife or child, but not both, he could dispose of one half.—Fitzherbert Nat. Brev., p. 122 H. (b.) 9th ed.; 2 Sand., p. 66, N. (9); 2 Sharswood Blackst. Comm., p. 492. All restrictions are now removed by 1 Vic., Ch. 26, both as to real and personal property. In the Civil Law, Novel 18, Ch. 1; Domat's Civ. Law, p. 15, the children have always been entitled to one fourth of the estate. Justinian increased it to one third to four or less number of children, and one half to more than four. And by the law of Louisiana, (see La. Code,) one child may claim one third; two may claim half, and three two thirds, etc. The exception in the text corresponds with the recognized principle that corporations, being a creation of the law, can do nothing unless authorized by law.—See note to Sec. 283, ante.

Written
will, how
to be
executed.

1276. Every will, other than a nuncupative will, must be in writing; and every will, other than an olographic will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them, to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

NOTE.—Stats. 1850, p. 177, Sec. 3. No particular form in the preparation of a will is at all necessary, if properly witnessed.—Estate of Wood, 36 Cal., p. 75. A will in the form of a deed valid—Hall vs. Bragg, 28 Georgia, p. 330; Panaud vs. Jones, 1 Cal., p. 488; Tevis vs. Pilcher, 10 Cal., p. 465; Castro vs. Castro, 6 Cal., p. 158; Redfield, Law of Wills, p. 165, et seq. and notes; Green vs. Skipwith, 1 Phillon, p. 35. Printing is held to be "*writing*."—Sec. 14, ante, Sub. 2; 2 Blk. Comm., p. 376, Chit. Notes; Temple vs. Mead, 4 Vt., p. 536; Henshaw vs. Foster, 9 Pick, p. 312.

SIGNING.—See Red. L. of Wills, p. 201, Sec. 18, et seq., and notes. Signing by another.—Red. L. of Wills, p. 208, Sec. 18, Subd. 7; Re Bailey, 1 Curteis, p. 914; Smith vs. Harris, 1 Rob., p. 262; Meehan vs. Rourke, 2 Bradf. Sur. Rep., p. 385; Robins vs. Corryell, 1 Barb., p. 556.

ACKNOWLEDGMENT OF ACT.—See Red. L. of Wills, p. 221, Sec. 18, Subd. 19, and note 40; Rosser vs. Franklin, 6 Grattan, p. 1. An acknowledgment of the act barely, adopts the signature.

WITNESSES, NUMBER, COMPETENCY, SIGNATURES, ETC.—Red. L. of Wills, p. 229, Sec. 19, (sign and subscribe the same,) et seq., and notes. See, also, 2 Greenleaf Evidence, Sec. 674.

SIGNATURE OF THE TESTATOR.—“Act” and “intention” must unite.

IN PRESENCE OF.—To constitute this presence, the testator must not only be present corporally, but mentally capable of recognizing, and conscious of the act being performed before him.—2 Green. Ev., p. 733, Sec. 678, and Note 1, p. 734.

1277. An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed.

Definition
of an
olographic
will.

NOTE.—Code Civil, p. 970; 5 Toullion, N. 357; 1 Stu. Low, ch. 327; 2 Bouvier Inst., N. 2139; La. Civ. Code, Art. 1581. The tendency of Courts to recognize the desires of decedents, however informally expressed, as shown in Note to Sec. 1317, post, is one reason for the adoption of this section; and while it obviates many difficulties and annoyances, may not, and, indeed, it is confidently claimed in those countries where olographic wills are recognized, does not give rise to as many attempts at fraudulent will making and disposition of property as where it does not exist; simply because the testator's intentions are unknown.

1278. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

Witness
to add
residence.

NOTE.—See Sec. 1276 and note, ante; also, Red. L. of Wills, p. 252 and note.

1279. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

Mutual
will.

NOTE.—Ex parte Day, 1 Bradf., p. 476.

1280. If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause

Compe-
tency of
subscribing
witness.

it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

NOTE.—Stats. 1850, p. 177, Sec. 4. The general rule is, that the witnesses must be competent and credible at the time they witness the execution of the will, for it may be said that they do in fact, if not in form, testify *at the time of subscribing*; and this is so, because the witness becomes such for the express purpose, thereafter, to testify to the competency of the testator to execute a will. And before he signs he is supposed to have concluded, in his own mind, that the testator is of sound and disposing mind and memory, and free from compulsion or restraint.—Red. L. of Wills, p. 255, and Note 3; consult, also, 2 Greenleaf Ev., Sec. 691. This accords with the protest of Lord Camden against a majority of the Bench in the case of Doe A. Hindson vs. Hersey, 4 Burns Eccl. L., p. 88. His opinion is now acquiesced in as the true exposition of the Statute of Wills.—Bargrave vs. Winder, 2 Ves., p. 634, and numerous other cases cited therein.

Conditional
will.

1281. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

NOTE.—A conditional statement, annexed to a draft of that which was intended for a will, in these words: "I intend this as a sketch of my will which I intend making on my return home" (Torre vs. Castle, 1 Comb., p. 303), was held to be a will on the ground that final instructions for a will were valid as a will when death of the testator alone prevented its execution. A will with a condition precedent, if not performed, will not of course be held valid.—Red. L. of W., p. 179, Note 45.

Gifts to
subscribing
witnesses
void.

1282. All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

Creditors
competent
witness.

NOTE.—Stats. 1850, p. 177, Sec. 5. This rule is evidently on the ground previously, in a note to Sec. 1276, discussed, that the incompetency of a witness who really begins to testify when he signs his name as a

Am witness, cannot afterwards become competent by removal of the disability.

1283. If a witness, to whom any beneficial devise, legacy, or gift, is made or given, would have been entitled to any share of the estate of the testator, in case the will is not established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will; and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

Witness who is a devisee, and who would be entitled to share of testator's estate if no will, entitled to share to amount of devise.

RW NOTE.—Stats. 1850, p. 177, Sec. 6.

1284. A will of real or personal property, or both, or a revocation thereof, made out of this State by a person not having his domicile in this State, is as valid, when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this State, and according to the provisions of this Chapter.

Will made out of this State.

Am NOTE.—Stats. 1850, p. 179, Sec. 23.

1285. No will or revocation is valid unless executed either according to the provisions of this Chapter, or according to the law of the place in which it was made, or in which the testator was at the time domiciled.

Will not duly executed, void.

RW 1286. Whenever a will, or a revocation thereof, is duly executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, the same is regulated, as to the validity of its execution, by the law of such place, notwithstanding that the testator subsequently changed his domicile to a place by the law of which such will would be void.

Subsequent change of domicile.

NOTE.—The three preceding sections change the rule of our statutes (as existing prior to the adoption of the Codes) requiring all wills to be executed ac-

cording to our laws, and admitted to probate as our laws require. These sections seem to be more liberal and just, and were therefore adopted. Sec. 1324 of the Code of Civil Procedure is made to conform to these sections. *Norris vs. Harris*, 15 Cal., p. 226; see, also, *Moultrie vs. Hunt*, 23 N. Y., p. 394; *Parsons vs. Lyman*, 20 N. Y., p. 103.

Republica-
tion by
codicil.

1287. The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

NOTE.—*Payne vs. Payne*, 18 Cal., p. 291; see, also, *Red. L. of Wills*, p. 286, Sec. 23, Subdivision 6. The effect of the last codicil is to republish all former ones.—*Gurst vs. Willasy*, 3 Bing., p. 614, S. C.; 12 J. B. Moore, p. 2. It must be formally executed to set up a former will (*Buel vs. Cunningham*, 3 B. Mon., p. 390), and clearly identify the paper set up.—*Tonnel vs. Hall*, 4 Comst., p. 140. But wills duly executed cannot give effect to codicils thereafter informally executed.—2 Ves., Jr., p. 204; 12 Vesey, p. 29; 2 Myl. and K., p. 765. A codicil, to take effect on the occurrence of an event which does not happen, may be probated if it refer to the will by date, on the above rule that it republishes the will.—*Mendez da Silva in re*, 2 Swab. and Trist., p. 315. The codicil is dependent on the will.—*Grimwood vs. Cozens*, 2 Swab. and Trist., p. 364; *Dutton in re*, 3 id., p. 66.

Nuncupa-
tive will,
how to be
executed.

1288. A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

NOTE.—*Hubbard vs. Hubbard*, 8 N. Y., p. 196.

Requisites
of a valid
nuncupa-
tive will.

1289. To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars;
2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect;
3. The decedent must, at the time, have been in his

last illness, or in actual military service in the field, or Same.
doing duty on shipboard at sea, and in either case in
actual contemplation, fear, or peril of death;

4. Except in the cases mentioned in Subdivision 3
of this section, it must be made at the dwelling house
of the testator, or where he was residing for the space
of ten days or more, unless taken sick from home and
death ensues before his return.

NOTE.—Stats. 1850, p. 177, Sec. 7; *Prince vs. Hazle-*
ton, 20 Johns., p. 502; *Ex. Thompson*, 4 Bradf., p. 154;
Hubbard vs. Hubbard, 8 N. Y., p. 196. The earliest
English writers define a nuncupative will as one made
by a testator who “lyeth languishing for fear of sudden
death, dareth not to stay the writing of his testament,
and, therefore, he prayeth his curate and others his
neighbors to bear witness of his last will, and declareth
by word what his will is.”—Perkins. Sec. 476, in the
time of Henry VIII; Swinburne, Part I, Sec. 12,
where it is said “this kind of testament is made com-
monly when the testator is very sick, weak, and past
all hope of recovery.” Chancellor Kent, however,
adds these words: “I do not infer from these passages
that unwritten wills were always bad at common law,
unless made in case of extremity, when death was just
overtaking the testator.”—Part I, Sec. 12, pl. 4. It is
generally regarded as a good rule to be observed that
the terms of the will be rigidly and strictly enforced,
and the statute authorizing them be strictly complied
with.

1290. No proof must be received of any nuncu- Proof of
nuncupa-
tive wills.
pative will, unless it is offered within six months
after speaking the testamentary words, nor unless the
words, or the substance thereof, were reduced to
writing within thirty days after they were spoken.

NOTE.—Stats. 1850, p. 178, Sec. 8. Another require-
ment of the statute which must be strictly complied
with. Sec, also, Sec. 1344, Co. Civ. Pro. Cal.

1291. No probate of any nuncupative will must
be granted for fourteen days after the death of the

Probate of
nuncupa-
tive wills.

testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other persons interested, to contest the probate of such will, if they think proper.

NOTE.—Stats. 1850, p. 178, Sec. 9. This is required to allow time to produce a written will and for the discovery of other facts which help to strengthen or defeat the application to prove the will, and must be strictly complied with. See, also, Sec. 1345, Co. Civ. Pro. Cal.

Written
will, how
revoked.

1292. Except in the cases in this Chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

NOTE.—Intention of testator, as expressed in subsequent will, or writing formally executed, governs the question of revocation under first subdivision.—Red. L. of Wills, pp. 304-7, or gathered from other circumstances.—id. See, also, id., et seq., as to second subdivision of this section. There must be a concurrence of *act* and *intention* to revoke—a rule which is more easily understood and more readily applied by Courts and juries to a given state of facts than almost any other.

Evidence of
revocation.

1293. When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

NOTE.—Stats. 1850, p. 178, Sec. 10. This is required to make the act of revocation correspond somewhat in formality with the execution of a will.

Rh
1294. A revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but where, in order to effect a new disposition, the testator attempts to revoke a provision of the will, by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected.

Revocation by obliteration on face of will.

NOTE.—Red. L. of Wills, p. 306, et seq., Sec. 25, Subds. 9-11.

1295. The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

Revocation of duplicate.

NOTE.—Where there are duplicates of the will, and the testator cancels the one in his custody, that is an effectual revocation of the whole will, if done with that intent.—Onions vs. Tyrer, 2 Vern., p. 741; Sir Edward Seymour's case, cited in Burtenshaw vs. Gilbert, Cowp., p. 49.

1296. A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

Revocation by subsequent will.

NOTE.—Conover vs. Hoffman, 15 Abb. Pr., p. 100; Robinson vs. Smith, 13 Abb. Pr., p. 359; McLoskey vs. Reid, 4 Bradf., p. 334; Nelson vs. McGiffert, 3 Barb. Ch., p. 158; Brant vs. Willson, 8 Cow., p. 56. In the cases of Dickinson vs. Swatman, 6 Jur. (N. S.), p. 831 (1860); Goodright vs. Glazier, 4 Burr, p. 2512; Harwood vs. Goodright, 1 Cowp., pp. 87-92; 1 Jarman, p. 128 and notes, the effect of a subsequent will, as a revocation of a former, is fully discussed and left by these authorities doubtful, but the text settles the question.

1297. If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of

Antecedent not revived by revocation of subsequent will.

such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished.

NOTE.—Stats. 1850, p. 178, Sec. 11. See preceding section and note.

Revocation
by
marriage
and birth
of issue.

1298. If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

NOTE.—Red. L. of Wills, p. 293 (ed. 1864). Marriage of a femme sole revokes.—Forse and Hunbling's Case, pp. 30, 31; Eliz. in Com. Banc., 4 Co. Rep., p. 60. So when wife survives husband.—1 Jarman Eng. (ed. 1861), p. 114; Colton vs. Lazer, 2 P. Wms., p. 623; Doe vs. Staple, 2 Term Rep., pp. 685-696, Kenyon, Ch. J. Marriage of a man, and particularly where issue is had, revokes will. This rule is deduced from the civil law.—Just. Inst. Lib., 2 Cap., p. 13, Sec. 5. Rule not confined to unmarried testator (Christopher vs. Christopher, cited in 4 Burr, p. 2182; s. c. Dick., p. 445; 1 Jarman Eng., ed. 1861, p. 115), but applies to one whose wife dies subsequently to making will, marries again, and by that subsequent marriage has issue.—Overby vs. Overby, 2 Show., p. 242; Lugg vs. Lugg, 2 Salk., p. 592; 1 Ld. Ryan, p. 441; 12 Mod., p. 226; Brown vs. Thompson, 1 Eq. Cas. Abr., p. 413, Pl. 15; Eyre vs. Eyre, 1 P. Wms., p. 304, in N. A.; Parsons vs. Lanoe, 1 Vesey, pp. 189-192; Amb., p. 557; Gibbons vs. Caunt, 4 Vesey, p. 840, and Am. note. The text regarding provision by the will being made for such subsequent issue is sustained (Red. L. of Wills, p. 294; Kenedel vs. Scrafton, 2 East., p. 530); and this is also the case when provision is made by another instrument.—Ld. Mansfield, Ch. J., in Brady vs. Cubett, Doug., pp. 31-39. So, also, it was held by Ld. Ellenborough, in Kenedel vs. Scrafton, supra, and by Ld. Kenyon, in Doe vs. Lancashire, 5 Term Rep., p. 58.

1299. If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

Effect of marriage of a man on his will.

NOTE.—Stats. 1850, p. 178, Sec. 12.

1300. A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

Effect of a marriage of a woman on her will.

NOTE.—Stats. 1850, p. 178, Sec. 13. See note to Sec. 1298, ante, "Femme Sole" and cases cited.

1301. An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

Contract of sale not a revocation.

NOTE.—Stats. 1850, p. 178, Sec. 14. The statute of 1 Vic., ch. 26, Sec. 23, supports the text of this section. Most of the American States have adopted similar statutes, or the substance of its provisions, which are the same as the text here. This, being in accord with the intent of the testator, is a reasonable and just provision.

1302. A charge or incumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or incumbrance.

Mortgage not a revocation of will.

NOTE.—Stats. 1850, p. 178, Sec. 15. This is a clearly

just provision, and similar in its equities to the preceding section.

Convey-
ance, when
not a
revocation.

1303. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

When
it is a
revocation.

1304. If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

Revocation
of codicils.

1305. The revocation of a will revokes all its codicils.

Afterborn
child,
unprovided
for, to
succeed.

1306. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

NOTE.—Stats. 1850, p. 178, Sec. 16. See Sec. 739, ante, and ample note on "Posthumous Child."

Children or
issue of
children of
testator
unprovided
for by his
will.

1307. When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section.

NOTE.—Stats. 1850, p. 178, Sec. 17.

1308. When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

Share of
afterborn
child, out
of what
part of
estate to be
paid.

NOTE.—Stats. 1850, p. 178, Sec. 18.

1309. If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.

Advance-
ment
during
lifetime of
testator.

NOTE.—Stats. 1850, p. 179, Sec. 19.

1310. When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator.

Death of
devisee,
being
relation of
testator in
lifetime of
testator,
leaving
lineal de-
scendants.

NOTE.—Stats. 1850, p. 179, Sec. 20.

1311. Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

Devises of
land, how
construed.

NOTE.—Stats. 1850, p. 179, Sec. 21.

Will to pass
rights
acquired
after the
making
thereof.

Am.
1312. Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, if it manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.

NOTE.—Stats. 1850, p. 179, Sec. 22; 1865-6, p. 381, Sec. 1. The preceding chapter is taken from our own statutes on wills. Reference is here made generally to the Code of Civil Procedure on the subject of Wills and the Probate Practice, as also to Title VII of this Div. on Succession, and notes.

1313 added

CHAPTER II.

INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

SECTION 1317. Testator's intention to be carried out.

1318. Intention to be ascertained from the will.

1319. Rules of interpretation.

1320. Several instruments are to be taken together.

1321. Harmonizing various parts.

1322. In what case devise not affected.

1323. When ambiguous or doubtful.

1324. Words taken in ordinary sense.

1325. Words to receive an operative construction.

1326. Intestacy to be avoided.

1327. Effect of technical words.

1328. Technical words not necessary.

1329. Certain words not necessary to pass a fee.

1330. Power to devise, how executed by terms of will.

1331. Devise or bequest of all real or all personal property, or both.

1332. Residuary clause.

1333. Same.

1334. "Heirs," "relatives," "issue," "descendants," etc.

1335. Words of donation and of limitation.

SECTION 1336. To what time words refer.

- 1337. Devise or bequest to a class.
- 1338. When conversion takes effect.
- 1339. When child born after testator's death takes under will.
- 1340. Mistakes and omissions.
- 1341. When devises and bequests vest.
- 1342. When cannot be divested.
- 1343. Death of devisee or legatee.
- 1344. Interests in remainder are not affected.
- 1345. Conditional devises and bequests.
- 1346. Condition precedent, what.
- 1347. Effect of condition precedent.
- 1348. Conditions precedent, when deemed performed.
- 1349. Conditions subsequent, what.
- 1350. Devisees, etc., take as tenants in common.
- 1351. Advancements, when ademptions.

1317. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Testator's
intention to
be carried
out.

NOTE.—*Kidwell vs. Brummagim*, 32 Cal., p. 436.

INTENTION OF TESTATOR.—*Brown vs. Lyon*, 6 N. Y., p. 420; *Chrystie vs. Phyfe*, 19 N. Y., p. 348. Must have effect as far as possible.—*Kane vs. Gott*, 24 Wend., p. 665; *Savage vs. Burnham*, 17 N. Y., p. 577; *Doe vs. Gallini*, 5 B. & Ad., p. 621; *Williams vs. McDougall*, 39 Cal., p. 80; *Estate of Wood*, 36 Cal., p. 75. Red. on L. of Wills, on pp. 432, 433, and notes, says: "All the books which treat of the construction of wills constantly repeat the formula, that the intention of the testator is the prevailing consideration in applying all the rules of construction. This will be found repeated an infinite number of times in the American reports." The English Courts have gone to great length in giving force to any form of request in a will, and making it of binding force on the executor. Similar alacrity in the Courts is manifested to construe informal documents and entries in books into the binding force of wills.—See Red. L. of Wills, pp. 175-6. The tendency of the Courts to extend to the intentions of decedents, however informally expressed, the validity of wills, is an argument in favor of the adoption of Sec. 1277, ante.

1318. In case of uncertainty arising upon the face of a will, as to the application of any of its pro-

Intention
to be
ascertained
from the
will.

visions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

NOTE.—“There is none of more universal application, both here and in England, than (the rule) that the plain and unambiguous words of the will must prevail, and are not controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances, or condition, either of the testator, his property, or family.”—Red. Law of Wills, p. 430; *Bunner vs. Storm*, 1 Sandf. Ch., p. 357; *Mann vs. Mann*, 14 Johns., p. 1; *Parsons vs. Winslow*, 6 Mass., p. 175; *Dawes vs. Swain*, 4 id., p. 208. Particular construction of words at variance with their more natural import, may be strengthened by such extraneous circumstances.—*Bullock vs. Evans*, 9 H. of L. Cas., p. 24; *Maddison vs. Chapman*, 5 Jur., (N. S.,) p. 277.

Rules of
interpreta-
tion.

1319. In interpreting a will, subject to the law of this State, the rules prescribed by the following sections of this Chapter are to be observed, unless an intention to the contrary clearly appears.

NOTE.—See the two preceding sections, and notes containing references to numerous authorities and decisions of recognized weight with all our Courts. It would be an inexcusable fault of the law, and of law makers, if, for the want of proper rules of interpretation, the last wish and desire of a decedent, who has gone to the trouble of placing in solemn writing his will, the property which he had expended a lifetime in accumulating, it may be, for a particular purpose—the object and aim of his material existence—should be perverted and devoted to objects and purposes never intended. It would be a still greater fault not to give force and efficacy to language employed in a will about which no two men could be found to disagree with regard to the intention of the testator. This result, in the past, has unfortunately happened. It is hoped, however, that these rules of interpretation of wills will prevent the repetition of such cases as that commented on in Note 5, p. 424, Red. on Law of Wills, as follows: “We often remember the remark of a Judge, sitting at *nisi prius*, when the acknowledgment of a deed of land was in all respects in due form, and had been duly registered and

acquiesced in for fifty years, except that the word '*acknowledged*' was unfortunately omitted. The Judge very coolly remarked that '*this was a very important word.*' Truly; and so is the word '*promise*,' in a promissory note, but its omission has been supplied by intendment and construction; and so has a note been held good when written, 'I promise *not* to pay,' etc.; so, also, the phrase, '*with issue*' is often construed '*without issue.*' And there are numerous very recent decisions of the English Courts where it has been held that the omission of any word in a will may be supplied by intendment where there is no doubt in regard to the word intended to be used."—*Townes vs. Wentworth*, 11 Moore P. C. C., p. 526. But the intendment must be clear—beyond all reasonable doubt—so that no two persons could be expected to differ in regard to the word intended.—*Thompson vs. Whitlock*, 5 Jur. (N. S.), p. 991; *Parish vs. Stone*, 14 Pick., p. 198; *Loring vs. Sumner*, 23 id., p. 96; *Wilbur vs. Smith*, 5 Allen, p. 194; *Longstaff vs. Rennison*, 1 Drewry, p. 28. Redfield, in his *Law of Wills*, p. 425, holds this language: "It is true * * that the general rules for the construction of wills, as drawn up by Mr. Jarman, have, in themselves, acquired, in some degree, the weight of authority. But in common with all general rules, they will be found to call for considerable discretion in their application to particular cases." The rules referred to are to be found in Jarman's Eng. Ed. of 1861, Vol. 2., p. 762, et seq.; also, in Red. L. of Wills, p. 425, Note 1. It is the purpose of the Code, in this Chapter, to render as certain as possible the rules of construction and interpretation of wills.—*Bruck vs. Tucker*, 32 Cal., p. 425; *Kidwell vs. Brummagim*, 32 id., p. 436; *Estate of Garraud*, 35 id., p. 336; *Carpentier vs. Gardner*, 29 Cal., p. 160; *Larco vs. Cassanueva*, 30 Cal., p. 560. Same instrument may operate as a conveyance and as a will.—*Adams vs. Lansing*, 17 Cal., p. 629. Will as a conveyance.—*Castro vs. Castro*, 6 Cal., p. 158.

1320. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.

Several instruments are to be taken together.

NOTE.—*Howland vs. Union Theo. Sem.*, 5 N. Y., pp. 193, 214; *Haven vs. Haven*, 1 Redf. Surr., p. 374; *Jauncy vs. Atty. Genl.*, 3 Giff., p. 308; *Stone vs. Evans*, 2 Atk., p. 86.

Harmonizing various parts.

1321. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

NOTE.—*All parts* construed relative to each other (*Arcularius vs. Geisenhainer*, 3 Bradf., p. 64; affirmed, 25 Barb., p. 403; *Egerton vs. Conklin*, 25 Wendall, pp. 224-238; *Covenhoven vs. Shuler*, 2 Paige, p. 130; *Ford vs. Ford*, 6 Hare, p. 492; *Stewart vs. Jones*, 3 De Gex. and J., p. 532), so as to form one consistent whole, if possible (*Carter vs. Hunt*, 40 Barb., p. 391; *Morrall vs. Sutton*, 1 Phillips, p. 533; *Mutter's Estate*, 38 Penn. St., p. 314; *Jennings vs. Newman*, 10 Sim., p. 223); but when several parts, whether in the same sentence or in different sentences (*Morrall vs. Sutton*, 1 Phillips, pp. 537-547), are absolutely (*Barclay vs. Maskelyne*, H. R. V. Johns., p. 131; *Sweet vs. Chase*, 2 N. Y., p. 79; *Covenhoven vs. Shuler*, 2 Paige, p. 123) irreconcilable, the latter must prevail.—See *Trustees of Theolog. Seminary vs. Kellogg*, 16 N. Y., p. 88; *Norris vs. Beyea*, 13 N. Y., p. 284; *Campbell vs. Rawdon*, 18 N. Y., p. 414; *Griffen vs. Ford*, 1 Bosw., p. 123; *Bradstreet vs. Clarke*, 12 Wend., p. 602.

In what case devise not affected.

1322. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

NOTE.—*Devise* not affected by reasons assigned therefor.—*Cole vs. Wade*, 16 Ves., p. 46; see *Thompson vs. Whitlock*, 5 Jur. (N. S.), p. 991. Nor by other words not equally clear and distinct.—*Thornhill vs. Hall*, 2 Cl. and F., p. 22; *Barclay vs. Maskelyne*, H. R. V. Johns., p. 126. This rule applies equally to prior (*Greenwood vs. Sutcliffe*, 14 C. B., p. 226) and to subsequent words.—*Arcularius vs. Geisenhainer*, 3 Bradf., p. 75; affirmed, 25 Barb., p. 403; *Kiven vs. Oldfield*, 4 De Gex and J., p. 30; *Borrell vs. Haigh*, 2 Jur., p. 229. Nor by inference or argument from other parts.—*Campbell vs. Harding*, 2 Russ. and M., p. 409; *Jennings vs. Newman*, 10 Sim., p. 223. Nor by inaccurate recital or reference.—*Hillarsdon vs. Lowe*, 2 Hare,

pp. 355, 372; *Mortimer vs. Hartley*, 3 De Gex and Sm., p. 332.

1323. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.

When ambiguous or doubtful

NOTE.—See *Hyatt vs. Pugsley*, 23 Barb., p. 285; *Marsh vs. Hague*, 1 Edw., p. 174.

1324. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

Words taken in ordinary sense.

NOTE.—Words are used in their *grammatical* sense, unless a clear intention otherwise is manifest.—*Hone vs. Van Schaick*, 3 N. Y., p. 538; *Cromer vs. Pinckney*, 3 Barb. Ch., p. 466; *Bullock vs. Downes*, 9 H. of L. Cas., p. 24; to be collected and ascertained.—*De Nottebeck vs. Astor*, 13 N. Y., p. 98; affirming S. C., 16 Barb., p. 412; *Bradhurst vs. Bradhurst*, 1 Paige, p. 331; *Covenhoven vs. Shuler*, 2 id., p. 122; *Rathbone vs. Dyckman*, 3 id., p. 9; *Crosby vs. Wendell*, 6 id., p. 548.

1325. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

Words to receive an operative construction.

NOTE.—*Griffen vs. Ford*, 1 Bosw., pp. 123-140; *Mason vs. Jones*, 2 Barb., p. 229; *Butler vs. Butler*, 3 Barb. Ch., p. 304; *Pond vs. Bergh*, 10 Paige, p. 140; *Doe vs. Gallini*, 5 B. & Ad., p. 621; 3 Ad. & El., p. 340; see *Chrystie vs. Phyfe*, 19 N. Y., p. 348.

1326. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Intestacy to be avoided.

NOTE.—*Booth vs. Booth*, 4 Ves., p. 407.

1327. Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

Effect of technical words.

NOTE.—Technical words are taken in their technical sense.—*Moore vs. Lyons*, 25 Wend., pp. 154, 155;

Campbell vs. Rawdon, 18 N. Y., p. 417; Brown vs. Lyon, 6 N. Y., p. 419; Jackson v. Luquere, 5 Cow., p. 228; Jenkins vs. Hughes, 8 H. of L. Cas., p. 571; Doe vs. Perratt, 6 Man. & Gr., pp. 335, 342, 350; unless the contrary clearly.—Doe vs. Gallini, 5 B. & Ad., p. 621; 3 Ad. & El., p. 340; Jesson vs. Wright, 2 Bligh., p. 57; indicates a contrary intention.—Corrigan vs. Kiernan, 1 Bradf., p. 208; Sherwood vs. Sherwood, 3 id., p. 230; De Kay vs. Irving, 5 Den. p. 646; Parks vs. Parks, 9 Paige, p. 107.

Technical words not necessary.

1328. Technical words are not necessary to give effect to any species of disposition by a will.

NOTE.—Jackson vs. Luquere, 5 Cow., p. 228; Parks vs. Parks, 9 Paige, p. 117.

Certain words not necessary to pass a fee.

1329. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

NOTE.—To similar effect is 1 Vict., ch. 26, Secs. 26-28.

Power to devise, how executed by terms of will.

1330. Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator.

NOTE.—Van Wert vs. Benedict, 1 Bradf., p. 123; Amory vs. Meredith, 7 Allen, p. 397. See a similar provision, 1 Vict., ch. 26, Sec. 27, as regards a general and beneficial power.

Devise or bequest of all real or all personal property, or both.

1331. A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

NOTE.—McNaughton vs. McNaughton, 41 Barb., p. 50; see, also, notes to Secs. 1274, 1317, 1318.

Residuary clause.

1332. A devise of the residue of the testator's estate, property, or real property, passes all the real property which he was entitled to devise at the time

of his death, not otherwise effectually devised by his will.

NOTE.—It has been doubted (*Van Cortlandt vs. Kip*, 1 Hill, p. 596; 7 id., p. 352; see *Prescott vs. Prescott*, 7 Metc., pp. 141, 146) whether this is the effect of a residuary devise, except where the beneficial taker under the prior devise is the same person as the residuary devisee (see *Tucker vs. Tucker*, 5 N. Y., p. 421), where the prior devise has been revoked by the testator (*Kip vs. Van Cortlandt*, 7 Hill, p. 346), or where the prior devise is only a charge upon, and not an exception from the residuary devise (*Cook vs. Stationers' Co.*, 3 Myl. & K., p. 262).

Am
1333. A bequest of the residue of the testator's Same.
estate, property, or personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

NOTE.—*Booth vs. Booth*, 4 Vesey, pp. 399-407; *Jones vs. Mackilwain*, 1 Russ., p. 220. In *Leake vs. Robinson*, 2 Mer., pp. 363, 386, Sir William Grant, M. R., said: "There is certainly a strong disposition in the Courts to construe a residuary clause so as to prevent an intestacy with regard to any of the testator's property."

✓ 1334. A testamentary disposition to "heirs," "re-
lations," "nearest relations," "representatives," "legal
representatives," or "personal representatives," or
"family," "issue," "descendants," "nearest" or
"next of kin" of any person, without other words of
qualification, and when the terms are used as words
of donation, and not of limitation, vests the property
in those who would be entitled to succeed to the prop-
erty of such person, according to the provisions of the
Title on Succession, in this Code.

"Heirs,"
"rela-
tives,"
"issue,"
"descend-
ants," etc.

NOTE.—*Norris vs. Hensley*, 27 Cal., p. 439. In this case Mr. Justice Currey, with great ability and learning, and with many cogent authorities referred to in support of his positions, thoroughly and exhaustively treats of the rules of construction of wills, and particularly the rule in "*Shelley's Case*."

Words of
donation
and of
limitation.

✓ 1335. The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person.

To what
time words
refer.

1336. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

NOTE.—Words in a will referring to death.—*Adams vs. Beekman*, 1 Paige, p. 631; *Ive vs. King*, 16 Beav., p. 41; *Howard vs. Howard*, 21 Beav., p. 550; *Schenck vs. Agnew*, 4 Kay & J., p. 405. Or survivorship.—*Young vs. Robertson*, 4 Macq., pp. 319, 330; *Young vs. Davies*, 9 Jur., (N. S.), p. 339. The contrary was held as to real property in *Moore vs. Lyons*, 25 Wend., p. 119, on the supposed English rule; but that rule does not exist.—*Taaffe vs. Connor*, 10 H. of L. Cas., p. 77; 22 Beav., p. 271. It makes no difference that there is a postponement without any preceding life interest.—*Hodgson vs. Micklethwaite*, 2 Drewry, p. 294. This rule is not now law when the life tenant dies before the testator.—*Spurrell vs. Spurrell*, 11 Hare, p. 154.

Devise or
bequest to
a class.

1337. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

NOTE.—Testamentary disposition to a class, includes every one answering to the description at testator's death.—*Tucker vs. Bishop*, 16 N. Y., p. 402; *Campbell vs. Rawdon*, 18 N. Y., p. 415. Persons who die before the testator are not included.—*Stires vs. Van Rensselaer*, 2 Bradf., p. 172; *Campbell vs. Rawdon*, 18 N. Y., pp. 414, 415. If possession is continued, it includes all coming within the description before the time to which it is continued.—See *Tucker vs. Bishop*, 16 N. Y., p. 402; *Johnson vs. Valentine*, 4 Sandf., p. 86. To the contrary.—*Doubleday vs. Newton*, 27 Barb., p. 444.

1338. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

When
conversion
takes effect.

NOTE.—Direction of the will to convert real property to money.—*Forsyth vs. Rathbone*, 34 Barb., p. 405; *Fowler vs. Depau*, 26 Barb., p. 239; *Harris vs. Clark*, 7 N. Y., p. 260; *Phelps vs. Pond*, 23 N. Y., p. 76. The proceeds deemed personal property.—*Meakings vs. Cromwell*, 5 N. Y., p. 136; *King vs. Woodhull*, 3 Edw., p. 79; *Bramhall vs. Ferris*, 14 N. Y., p. 46; *Johnson vs. Bennett*, 39 Barb., p. 252. From testator's death.—*Kane vs. Gott*, 24 Wend., p. 669.

1339. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

When
child born
after
testator's
death takes
under will.

NOTE.—*Rawlins vs. Rawlins*, 2 Cox, p. 425; *Trower vs. Butts*, 1 Sim. & Stu., p. 181; *Jenkins vs. Freyer*, 4 Paige, p. 53; see Sec. 739, ante, and note.

1340. When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.

Mistakes
and
omissions.

NOTE.—Imperfect description, (*Fleming vs. Fleming*, 8 Jur. [N. S.], p. 1042,) of person (*Connolly vs. Pardon*, 1 Paige, p. 291; *Smith vs. Smith*, 4 id., p. 271; *Wightman vs. Stoddard*, 3 Bradf., p. 405; *Hart vs. Marks*, 4 id., p. 161; *Lee vs. Pain*, 4 Hare, p. 249,) or property (*Roman Cath. Asylum vs. Emmons*, 3 Bradf., p. 144; *Smith vs. Wyckoff*, 3 Sandf. Ch., pp. 82, 88). Mistakes and omissions (*Hart vs. Tulk*, 2 De Gex, M. & G., p. 300,) must be corrected if the error appears from the context or extrinsic evidence (see *Stanley vs. Stanley*, 2 Johns. & Hem., p. 513; see *Blundell vs. Gladstone*, 1 Phillips, p. 279). The testator's declarations are generally inadmissible.—*Doe vs. Hiscocks*, 5

Mees. & W., p. 563. To the contrary.—*Ex parte Hornby*, 2 Bradf., p. 420. Otherwise, if the words are equally descriptive of several persons (*Doe vs. Allen*, 12 Ad. & El., p. 451; *Fleming vs. Fleming*, 8 Jur. [N. S.], p. 1042,) or subjects of ownership (see *Douglass vs. Fellows*, 1 Kay, pp. 114, 120).

When
devises and
bequests
vest.

1341. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

NOTE.—Devises—*Post vs. Hover*, 30 Barb., pp. 312, 319; bequests—*Dupre vs. Thompson*, 8 Barb., p. 537.

When
cannot be
divested.

1342. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

NOTE.—*Williams vs. Jones*, 1 Russ., p. 517; *Humberston vs. Stanton*, 1 Ves. and B., p. 485.

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Death of
devisee or
legatee.

1343. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place.

NOTE.—*Savage vs. Burnham*, 17 N. Y., p. 575.

Interests in
remainder
are not
affected.

1344. The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder, who survive the testator.

NOTE.—Devisee's death (*Downing vs. Marshall*, 23 N. Y., p. 370; 23 How. Pr., p. 7; *Campbell vs. Rawdon*, 18 N. Y., p. 421), or that of a legatee of a limited interest, prior to that of testator, does not defeat the interests of persons in remainder who survive him.

Conditional
devises and
bequests.

1345. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Condition
precedent,
what.

1346. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

NOTE.—See Sec. 1281, ante, and note.

1347. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will. Effect of condition precedent.

1348. A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Conditions precedent, when deemed performed.

1349. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. Conditions subsequent, what.

1350. A devise or legacy given to more than one person vests in them as owners in common. Devisees, etc., take as tenants in common.

1351. Advancements or gifts are not to be taken as adempptions of general legacies, unless such intention is expressed by the testator in writing. Advancements, when adempptions.

CHAPTER III.

GENERAL PROVISIONS.

SECTION 1357. Nature and designations of legacies.

1. Specific.
2. Demonstrative.
3. Annuities.
4. Residuary.
5. General.

1358. Order of sale in case of an intestate.

1359. Order of sale in case of a testator.

1360. Legacies, how charged with debts.

1361. Same.

1362. Abatement.

1363. Specific devises and legacies.

SECTION 1364. Heir's conveyance good, unless will is proved within four years.

1365. Possession of legatees.

1366. Bequest of interest.

1367. Satisfaction.

1368. Legacies, when due.

1369. Interest.

1370. Construction of these rules.

1371. Executor according to the tenor.

1372. Power to appoint is invalid.

1373. Executor not to act till qualified.

1374. Provisions as to revocations.

1375. Execution and construction of prior wills not affected.

1376. The law of what place applies.

1377. Liability of beneficiaries for testator's obligations.

Nature and
designation
of legacies.

1357. Legacies are distinguished and designated, according to their nature, as follows:

Specific.

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator;

Demon-
strative.

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

Annuities.

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy;

Residuary.

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

General.

5. All other legacies are general legacies.

NOTE.—SPECIFIC—*Subd. 1.*—3 Beav. Rolls, p. 349; Holdfast, D. vs. Pardoe, 2 Blk. Comm., p. 975; Doe, D. vs. Sloggett, 5 Exch., p. 107; Battison vs. Rickards, 7 Taunt., p. 105. Legatee may insist on incumbrances being removed by the executor.—Red. Law of Wills, Part II, p. 280; Knight vs. Davis, 3 Myl. & K., p. 358; Swinb., Part VII, Sec. 20, pl. 18.—See, also, Part II, Red. L. of Wills (ed. 1866,) p. 462, *Subd. 9*; not subject to contribute for deficiency.

DEMONSTRATIVE—*Subd. 2.*—This term is from the civil law, not liable to ademption, and fails by calling in or changing the fund, but is payable out of general assets.—Red. L. of Wills, Part II, p. 463, Subd. 10; *Chaworth vs. Beech*, 4 Ves., p. 555.

ANNUITY—*Subd. 3.*—Is the grant of a sum of money to be paid annually, unless otherwise provided in the will for life, term of years, or in perpetuity, and generally regarded as mere personalty.—Red. L. of Wills, Part II, (ed. 1866), p. 168, Sec. 25, 1-2; *Taylor vs. Martindale*, 12 Sim., p. 158; *Turner vs. Turner*, Amb., p. 776; S. C. 1 Br. C. C., p. 316; *Earl of Stafford vs. Buckley*, 2 Ves. Sen., p. 170; *Lady Holderness vs. Ld. Carmarthen*, 1 Br. C. C., p. 377; *Booth vs. Ammerman*, 4 Bradf. Sur. R., p. 129.

RESIDUARY—*Subd. 4.*—A bequest of *all* personal estate is not residuary.—2 Wms. Exrs., p. 1054; 1 Roper Leg., p. 215; *Colkins vs. Colkins*, 1 Redf. Sur. Rep., p. 337; Red. L. of Wills, p. 475, (1866 ed.), Part II, but all at a particular place is; so, also, when there is a specification of the residue on almost every other limitation. The text of this section, however, confines or limits it to the residue after all the bequests of the will are discharged.

am 1358. When a person dies intestate, his property, except such as is otherwise disposed of under this Code, and under Chapter V, of Title XI, of Part III, of the CODE OF CIVIL PROCEDURE, and exempt from execution therein, is to be resorted to, in the following order, in payment of debts:

Order of
sale in case
of an
intestate.

1. Personal property;
2. Real property, other than estates of freehold;
3. Estates of freehold.

NOTE.—See Sec. 1516 and note, Co. Civ. Pro. Cal. Debts and claims valid against testator must all be paid before legacies.—Red. L. of Wills, Part II, (ed. 1866), p. 547; *Lomas vs. Wright*, 2 Myl. & K., p. 769; 2 Wms. Exrs., p. 914.

am 1359. The property of a testator, with the exception specified in the last section, is to be resorted to, in the following order, for the payment of debts and legacies:

Order of
sale in case
of a
testator.

Same.

1. Personal property, excepting such as is expressly exempted in the will;
2. Real property expressly devised to pay debts or legacies, where the personal property is exempted in the will, or where the personal property which is not exempted is insufficient;
3. Real property which is not effectually devised;
4. Property, real or personal, charged with debts or legacies; but though real property is charged with the payment of legacies, the personal property is not to be exonerated;
5. The following property, ratably: real property, devised without being charged with debts or legacies, and specific and demonstrative legacies;
6. Personal property expressly exempted in the will.

NOTE.—Part III, Co. Civ. Pro. Cal., Tit. XI, Chap. VII, Art. I—Personal property first resorted to to pay debts. Arts. II and III—Sales of personal property. Id., Chap. X, Arts. II and III—Accounting and settlement of estates, and payment of debts. Chap. XI, id., Arts. I and II—Payment of legacies, and distribution and final settlement. When personal property is insufficient to pay debts, real estate resorted to.—*Stuart vs. Allen*, 16 Cal., p. 473; argued ably, with elaborate briefs, and thoroughly discussed by the Court through *Baldwin, J.*; see, also, *Haynes vs. Weeks*, 20 Cal., p. 288. When the testator dies leaving both personal and real estate, and owing debts secured by mortgage on the realty, and bequeaths all the personal and one half the real estate to one devisee, and the remaining half of the latter to another, without mentioning the debts, the legacies and devises are all general, and the entire property devised must contribute pro rata to the payment of the debts.—*Estate of Woodworth*, 31 Cal., p. 595; *Alba vs. Burnett*, 33 Cal., p. 667; see, also, Sec. 1563 (§ 180) and 1564 (§ 181) of the Co. Civ. Pro. Cal. When real estate may be sold to pay legacies, see Sec. 1559, Co. Civ. Pro. Cal. Order for payment of legacies and extension of time, see Sec. 1651, Co. Civ. Pro. Cal. Partial payment of legacies, etc., see Secs. 1658 to 1661 inclusive, Co. Civ. Pro. Cal. At common law, where no different order is prescribed by the will, the assets of the decedent will be marshaled, and the debts paid out of them, in the following order:

1. Personal estate not specifically bequeathed, or expressly or by implication excepted. 2. Lands expressly devised for the payment of debts. 3. Lands descended to the heirs; and, 4. Lands devised.—Woodworth's Estate, 31 Cal., p. 595. Personal estate to be first exhausted to pay debts, even those secured by mortgage, if the personal debts of the testator.—Id. A specific bequest indicates an intention to discharge the property so bequeathed from the payment of debts.—Id. It will appear from these authorities, taken in connection with Secs. 1563-4 Co. Civ. Pro. above, that the text makes but little change in the statutes.

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1360. In the application of the personal property of a decedent to the payment of debts, legacies must be charged in the following order, unless a different intention is expressed in the will:

Legacies,
how
charged
with debts.

1. Residuary legacies;
2. General legacies;
3. Legacies given for a valuable consideration, or for the relinquishment of some right or interest;
4. Specific and demonstrative legacies.

NOTE.—See Secs. 1357 and 1359, ante, and notes. Specific legacies paid next after debts.—Red. L. of W., p. 549, (ed. 1866); Clifton vs. Burt, 1 P. Wms., p. 678. Unless general were made a charge on the special. Sayer vs. Sayer, Prec. Ch., p. 392; White vs. Green, 1 Jud. Ch., p. 45. From this it is seen the rule for the abatement of legacies is the converse of their order as charges upon the estate, as laid down in Red. L. of Wills, p. 549, et seq., Subds. 7, 8, 9, 10, 11, 12. But demonstrative legacies are to be abated only when the demonstrative fund is exhausted, and the remainder becomes a general legacy.—Red. L. of Wills, p. 469, Subd. 18; Mullins vs. Smith, 1 Drew & Sm., p. 204; White vs. Beattie, 1 Dev. Eq., p. 320. See, also, note to the preceding section.

1361. Legacies to husband, widow, or kindred of Same any class are chargeable only after legacies to persons not related to the testator.

NOTE.—The rule of the text seems to be so well founded in natural justice, and to accord so nearly with that which is presumed to be the natural inclination of the testator, that approbation is accorded to it, not-

withstanding the converse is laid down in *Red. L. of Wills* (ed. 1866), Part II, p. 552, Subd. 12, where, too, it is conceded that in all probability other legacies would not have been made if the testator could have supposed that the legacies to those naturally dependent on him would have from any cause failed. When a widow receives in lieu of her dower, the legacy is preferred as a consideration; and so may a legacy be exempt from abatement, made to a wife or child destitute of other provision. This was so held in *Duncan vs. Alt*, 3 Penn. R., p. 382, Gibson, C. J.

Abatement 1362. Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

NOTE.—A manifestly proper rule.

Specific devises and legacies. 1363. In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the Judge of the Probate Court to sell the property devised and bequeathed, in the cases herein provided.

NOTE.—The executor should collect things specifically bequeathed, as well as other portions of the estate, and dispose of them by delivery to the legatee, unless absolutely required for the payment of debts.—*Clarke vs. Ormonde*, Jacob., p. 108. In what language will must be couched to be construed as a deed.—*Norris vs. Hensley*, 27 Cal., p. 439; *Bruck vs. Tucker*, 32 Cal., p. 425; *Estate of Woodworth*, 31 id., p. 595.

Heir's conveyance good, unless will is proved within four years. 1364. The rights of a purchaser or incumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the Clerk of the Probate Court having jurisdiction thereof, or unless written notice of such devise is filed with the Clerk of the

county where the real property is situated, within four years after the deviser's death.

NOTE.—See Secs. 1314 (§§ 20, 23) and 1318 (§ 25) of the Code of Civil Procedure, California. Recording the written notice of devise is intended to obviate any delays in recording the will occasioned by contesting its probate, as, in the absence of any restriction in the will, the legatee would be authorized to take in many cases of protracted contests long prior to admission of the will to probate; one year being ordinarily allowed in which to ascertain indebtedness and pay legacies, in accordance with amount of assets.—Red. L. of Wills (ed. 1866), Part II, p. 564, Sec. 59.

1365. Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

Possession
of legatees.

1366. In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

Bequest of
interest.

NOTE.—The question of vested estates, and the time when taken, together with the interest, accumulation, or income thereon, discussed in pp. 613, 614, Red. L. of Wills, Part II (ed. 1866); Sir John Leach, M. R., *Vawdry vs. Geddes*, 1 Russ. and My., p. 203; 1 Jarman, p. 802 (ed. 1861), and cases there cited. Income allowed during the time the investment is deferred.—Red. L. of Wills, Part II, p. 837 Sec. 72 (ed. 1866). The text refers to a sum certain, and nowise contingent or conditional, except that of subjection to payment of debts.—Sir John Leach, Chancellor, in *Stott vs. Hollingsworth*, 3 Wadd., p. 161; *Taylor vs. Hibbert*, 1 Jac. and W., p. 308; *Griffith vs. Morrison*, id., in Note 311, it was held that at the end of the year the ascertained residue was the capital, to the interest of which the tenant for life of the residue shall be entitled. It is not unreasonable that the bequest carries such income as the residue raises.

Satisfac-
tion.

1367. A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied.

NOTE.—See “Nuncupative Will,” Sec. 1288, ante, Subd. 3. Actual *contemplation, fear, or peril of death*, Sec. 1149, ante. See, also, Article III, Chapter II, Title IV, Part IV, Division II, ante, and the notes to Secs. 1140 to 1153, inclusive.

Legacies,
when due.

1368. Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

NOTE.—See conclusion of note to Sec. 1366, ante.

Interest.

1369. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

NOTE.—See Sec. 1366, ante, and note.

Construc-
tion of
these rules.

1370. The four preceding sections are in all cases to be controlled by a testator's express intention.

NOTE.—This is on the general principle set forth in Sec. 1317, ante, and the note thereto, that a will must be construed “according to the intention of the testator.”

Executor
according
to the tenor

1371. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

NOTE.—On the general principle which requires intention of the testator to be given effect.

Power to
appoint is
invalid.

1372. An authority to an executor to appoint an executor is void.

NOTE.—See Sec. 1353, (§ 45) Co. Civ. Pro. Cal.

1373. No person has any power, as an executor, until he qualifies, except that, before letters have been

issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

Executor
not to act
till
qualified.

NOTE.—Article VI, Ch. III, Title XI, Part III,
Co. Civ. Pro. Cal.

1374. The provisions of this Title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect.

Provisions
as to revo-
cations.

1375. The provisions of this Title do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.

Execution
and
construc-
tion of
prior wills
not affected

Am
1376. Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real property within this State, by the law of this State; ~~when relating to personal property, by the law of the testator's domicile.~~

The law of
what place
applies.

NOTE.—Subdivision 22 of Sec. 14, ante, declares that the term "will," as used in this Code, includes codicils. Our Stats., 1850, p. 177, Sec. 24, also makes the same declaration.

1377. Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the CODE OF CIVIL PROCEDURE.

Liability of
benefici-
aries for
testator's
obligations.

NOTE.—The three Chapters comprising the Title on Wills embraces all the laws of our State relating to the subject not contained in Title XI of the Code of Civil Procedure.

TITLE VII.

SUCCESSION.

SECTION 1383. Succession defined.

- 1384. Who first succeeds to possession of estates not devised, and for what purpose.
- 1385. Personal representatives.
- 1386. Succession to and distribution of property.
- 1387. Illegitimate children to inherit in certain events.
- 1388. The mother is successor to illegitimate child.
- 1389. Degrees of kindred, how computed.
- 1390. Same.
- 1391. Same.
- 1392. Same.
- 1393. Same.
- 1394. Relatives of the half blood.
- 1395. Advancements constitute part of distributive share.
- 1396. Advancements, when too much, or not enough.
- 1397. What are advancements.
- 1398. Value of advancements, how determined.
- 1399. When heir, advanced to, dies before decedent.
- 1400. Inheritance of husband and wife from each other.
- 1401. Distribution of the common property in case of death of the wife.
- 1402. Distribution of common property on death of the husband.
- 1403. Inheritance by representation.
- 1404. Aliens may inherit, when, and how.
- 1405. Succession not claimed, Attorney General to cause to be sold, and proceeds deposited.
- 1406. When the property and estate escheat to the State.
- 1407. Property escheated subject to charges as other property.
- 1408. Successor liable for decedent's obligations.

Succession
defined.

1383. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

NOTE.—It will be observed that the term "*succession*" has been substituted for that of "*descents and distributions*," so familiar to all. This has not been done without sufficient grounds. The term "*descents*" and "*distributions*" hitherto used in this State to denote the devolution of an inheritance, was derived from the ancient principle of the English law, that an inheritance could never ascend, or pass from

son to father, but must descend, or pass to descendants. But as the American law allows property to pass in both ways, there arises an incongruity in continuing this use of the term; an incongruity which causes practical embarrassment, since the word 'descendants' must still be confined to its strict meaning, and cannot embrace all those who may take by our Statute of Descents, so called, and the word 'descend' must often be used in the same view and in contradistinction to the devolution of property in the ascending line. The term 'succession' is the more appropriate phrase of the civil law, and this, already in common use among us, has been adopted to denote the transmission of the property of a decedent by operation of law.

Bouvier, under Title "Descent," says: The rules of descent are prescribed by the statute laws of the several States; and although they correspond in some respects, it is doubtful whether in any two they are precisely alike.—Bouv. L. Dic, 1 vol., p. 463. And there gives the laws of several States, including our own.

Am 1384. The property, both real and personal, of any one who dies without disposing of it by will, passes, in the first instance, to the personal representative of such person as Trustee:

Who first succeeds to possession of estates not devised, and for what purpose.

1. To make the provision for the surviving husband, or wife, or child, which is directed by Title XI, of Part III, of the CODE OF CIVIL PROCEDURE;

2. To apply the property to the payment of the debts of the decedent, according to the Title on Wills, and the provisions of the CODE OF CIVIL PROCEDURE; and,

3. To distribute any remaining property among those entitled to succeed to the property of the decedent, according to the provisions of this Title.

NOTE.—The object of the very important change proposed by this Title is to simplify the settlement of estates, and particularly titles to real property, by vesting the whole estate of the decedent in the executors or administrators. By the existing law the term "real property," as between the heir and the executor, has a very different extent of meaning from the same term in other uses, and doubtless different from that popularly attached to it by testators and others contemplating the

provision which their families may require in case of their death. There seems to be no reason why the property of the landholder should be devolved by law upon one class of persons, while the property of the merchant, who may leave a family situated in the same circumstances, is devolved by law upon another class, or in a different method. For this reason, one method of distribution for both real and personal property is adopted, it being substantially the method the law heretofore pursued in respect to personal property.

Personal
representa-
tives.

1385. The personal representative of a decedent, within the meaning of that phrase as used in the preceding section, is the duly qualified and acting executor, administrator, or administrator with the will annexed, of the estate of the decedent.

NOTE.—See Title XI, Part III, of the Co. Civ. Pro. Cal.

Succession
to and dis-
tribution of
property.

1386. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the same by will, it is succeeded to, and must be distributed, subject to the payment of his debts, in the following manner:

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation. If there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation;

2. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to

the decedent's father. If there be no father, then one Same. half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leaves a mother also, she takes an equal share with the brothers and sisters. If decedent leaves no issue, nor husband, nor wife, the estate must go to his father;

3. If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if a mother survives, she takes an equal share with the brothers and sisters;

4. If the decedent leaves no issue, nor husband, nor wife, nor father, and no brother nor sister is living at the time of his death, the estate goes to his mother, to the exclusion of the issue, if any, of deceased brothers or sisters;

5. If the decedent leaves a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife;

6. If the decedent leaves no issue, nor husband, nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote; however:

7. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the

Same.

same parent, and to the issue of any such other children who are dead, by right of representation;

8. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

9. If the decedent leaves no husband, wife, or kindred, the estate escheats to the State, for the support of common schools.

NOTE.—Stats. 1850, p. 219, Sec. 1; 1862, p. 569, Sec. 1; see, also, Sec. 1389, post, and note. The seventh clause of this section was sustained *In Re the Estate of F. C. Castro vs. Barry*, 18 Cal., p. 96, wherein it was held that when the wife dies leaving a husband and their two infant children, a boy and a girl, the boy dies unmarried, the father inherited one third of the wife's separate property; but that the surviving sister, and not the father, inherits the deceased boy's share. Held, further, that the second clause or subdivision of this section did not control the descent or succession. Under the Spanish law in force in the Republic of Texas in 1839, the parents inherited the estate of a dying child in equal proportions.—*Reese vs. Hicks*, 13 Texas, p. 162. Title to personal estate of decedent vests in the heir, but the administrator is entitled to the possession relating back to decedent's death.—*Johns. vs. Nolting*, 29 Cal., p. 507. Heir may recover in ejectment without entry after death of testator; it is sufficient to show title.—*Soto vs. Kroder*, 19 Cal., p. 87. This right was discontinued by statutory amendment, so that in the case of *Meeks vs. Hahn*, 20 Cal., p. 620, it was held that ejectment, for property of which the decedent died seized, could not be maintained by his heirs until administration and settlement of the estate. This right of action has been, however, restored to the heirs, as also the right to the possession prior to settlement of the estate, by the Code of Civil Procedure. See Secs. 1581 (§ 194), 1452 (§ 114), and 1453 (§ 114). In *Jewell vs.*

Jewell, 28 Cal., p. 232, it was held that "descendants" are children, grandchildren, and their children, to the remotest degree. In *People vs. De la Guerra*, 24 Cal., p. 73, it was held that in computing degrees of consanguinity, the common law was the rule in all cases except in regard to descents and distributions, where the rule of the civil law prevailed. Inheritance of husband from wife and wife from husband, and the right to common property (known now as community property in the Codes), fully discussed in *Payne vs. Payne*, 18 Cal., p. 291, and cases there cited. There being no descendants of the decedent, and it clearly appearing the surviving husband or wife is entitled to the whole of the common (or community) property.—*Cummings vs. Cheveier* (No. 1), 10 Cal., p. 519. Real property conveyed to wife by deed, for consideration, during coverture, is community property. At husband's death she succeeds to half, in common with his heirs, and may maintain ejectment against any mere intruder.—*Hart vs. Robertson*, 21 Cal., p. 346; *McLean vs. Benton*, 31 Cal., p. 29; *Jewell vs. Jewell*, supra, 28 Cal., p. 232; *Scott vs. Ward*, 13 Cal., p. 458. Wife entitled to half community property, etc.—*Morrison vs. Bowman*, 29 Cal., p. 337; *Packard vs. Avellanes*, 17 Cal., p. 525. As to inheritance by father, see *Hardenburgh vs. Bacon*, 33 Cal., p. 356. Possessory right to public lands an estate of inheritance.—*Grover vs. Hawley*, 5 Cal., p. 485. When, under Mexican law, one dies and his heirs in common enjoy property left for a long time without administration, and an action is brought for a settlement and division, they are treated as tenants in common, and all interested are necessary parties.—*Valencia vs. Bernal*, 26 Cal., p. 328. Estate being distributive, share not claimed by absent heir to be paid to State Treasury, and not paid to heirs other than absentee.—*Pyatt vs. Brockman*, 6 Cal., p. 418. See, also, Sec. 1693 (§ 276), Co. Civ. Pro. Cal. Allowing non-resident aliens to inherit is constitutional.—13 Cal., p. 159 (*State vs. Rogers*). See Sec. (ante) 671: "Any person, whether citizen or alien, may take and hold property, real or personal;" and note thereto, as follows: Cal. Const., Art. I, Sec. 17; *Ramaratz vs. Kent*, 2 Cal., p. 558; *Attorney General vs. Folsom*, 5 Cal., p. 373; *Sumssen vs. Bofer*, 6 Cal., p. 250; *Norris vs. Hoyt*, 18 Cal., p. 217; *Farrell vs. Enright*, 12 Cal., p. 450; *State of California vs. Rogers*, 13 Cal., p. 159. Also, Sec. (ante) 672: "If a non-

resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred." The property in such case is disposed of as provided in Title VIII, Part III, Code of Civil Procedure. See *Stats.* 1856, p. 137; *People vs. Rogers*, 13 Cal., p. 159.

Illegitimate children to inherit in certain events.

1387. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

NOTE.—*Stats.* 1850, p. 219, Sec. 2. The evidence supporting the claim under it, to inherit, should be clear and exclude every other rational conclusion than that the decedent was the parent. In the case of the *Estate of Sanford*, 4 Cal., p. 12, the Court say: "Nor do we in deciding the case upon this ground intend to intimate that any writing containing the evidence required would be sufficient to create an heir under the estate, when it appears upon the face of the instrument that there existed no such object or intention at the time it was made." In *Hartwell vs. Jackson*, 7 Texas, p. 576, it is said that there, without regard to the grounds of nullity, the issue of such marriages inherit as fully as

legitimate children.—See *Graham vs. Bennett*, 2 Cal., p. 503, on this section.—See English rule, Red. L. of Wills, p. 907-8; *Boyes vs. Bedale*, 12 Weekly Rep., p. 232, before Vice Chancellor Wood. A bequest to the children of one who cohabited with a woman in England, and had children by her there, and subsequently removed to Holland, where they continued to cohabit and had children, both before and after their marriage which took place while domiciled in Holland, by which the children became legitimate by the law of that country, will not carry anything to the children born in England, whose illegitimacy is irretrievably fixed by the law of the place of their birth.—*Goodman vs. Goodman*, 3 Giff., p. 643, admitted all the children born in Holland only. The rule of the text is different, and a marriage legitimizes all born before wedlock. Construction of a will charging the estate with "support and education" of an illegitimate child.—*Williams vs. McDougall*, 39 Cal., p. 80.

1388. If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease to her heirs at law.

The mother is successor to illegitimate child.

NOTE.—Sec. 3 of the Act of April thirteenth, eighteen hundred and fifty, modified by adding, "has not been acknowledged or adopted by his father."

1389. The degree of kindred is established by the number of generations, and each generation is called a degree.

Degrees of kindred, how computed.

NOTE.—*Poydras vs. Livingston*, 5 Martin's La. Reports, p. 292; Code Napoleon, p. 735; Poth. Success, ch. 1, Toul. IV, p. 165. In *The People vs. De la Guerra*, 24 Cal., p. 73, it is expressly declared that descents and distributions of our law are taken from and governed by the rules of the civil law. Stat. of 1851, p. 221, Sec. 4.

1390. The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common

Same.

ancestor, is called the collateral line or collateral consanguinity.

NOTE.—Louisiana Civil Code, Art. 886.

Same. 1391. The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends.

NOTE.—Louisiana Code, Art. 886.

Same. 1392. In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.

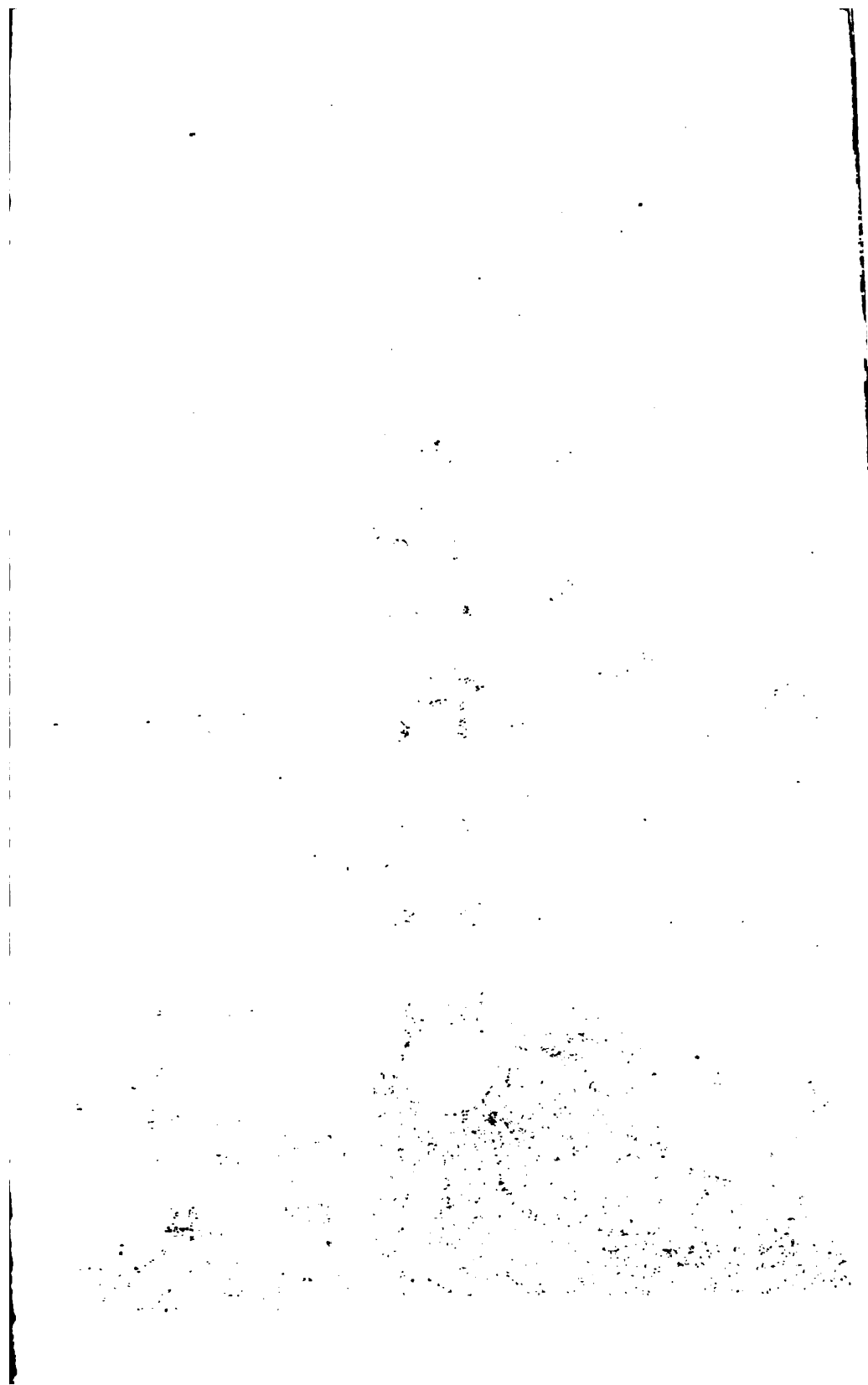
NOTE.—Louisiana Code, Art. 887.

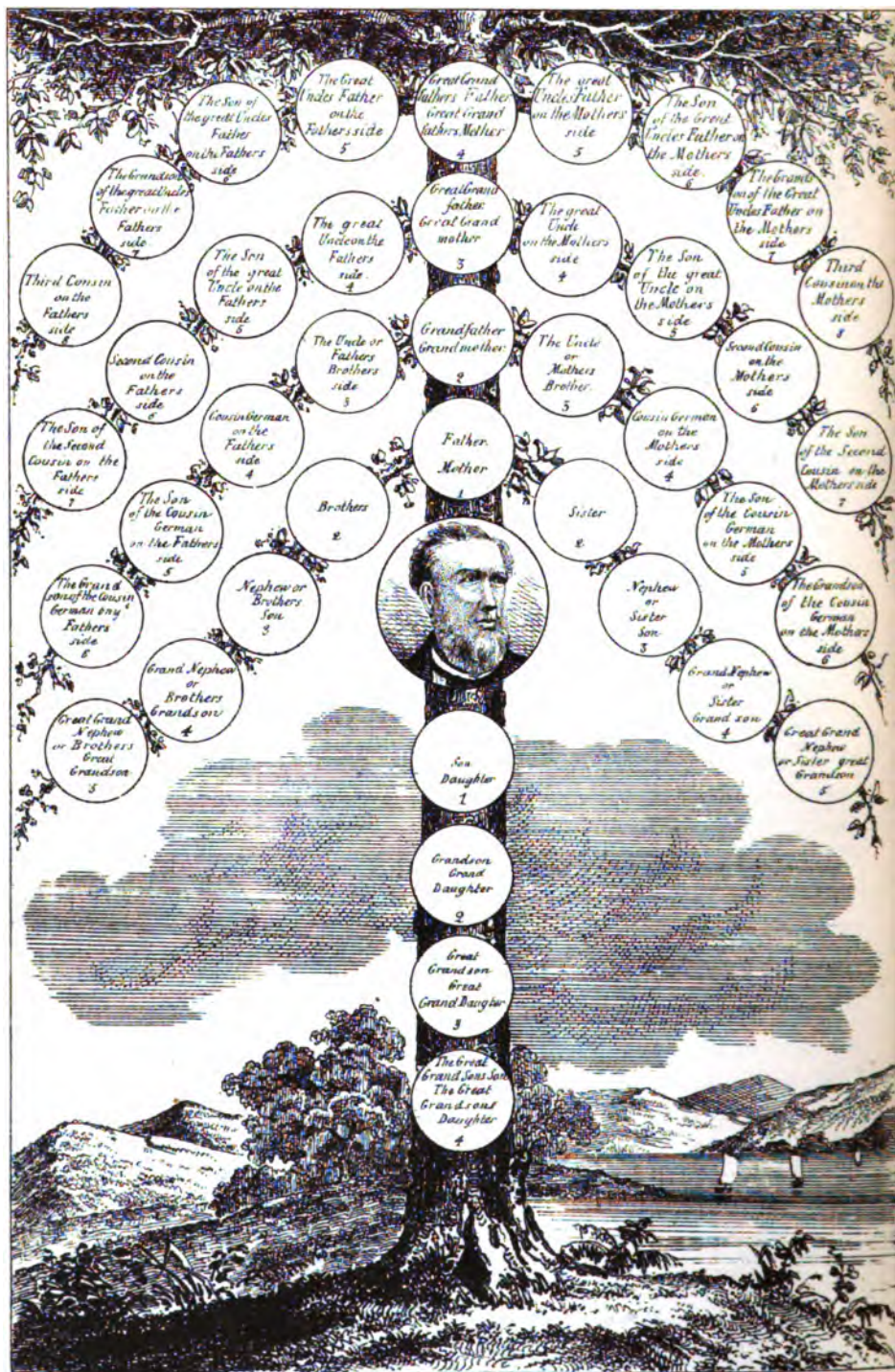
Same. 1393. In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on.

NOTE.—Montesq. *Esprit des Lois*, Liv. 27; Louisiana Code, Art. 888.

Relatives of the half blood. 1394. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

NOTE.—Stats. 1850, p. 221, Sec. 4. The half blood are equally entitled with the full blood of equal degree. *Red. L. of Wills*, p. 903 (ed. 1866), Part II; 2 *Kent's Com.*, p. 421.





1395. Any estate, real or personal, given by the decedent in his lifetime, as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent.

Advancements constitute part of distributive share.

NOTE.—Stats. 1850, p. 221, Sec. 5. If the father, during his lifetime, on the occasion of the marriage or settlement in life or otherwise, has made any advancements to any of his children *toward their distributive share in his estate* this must be reckoned in making the distribution. See Sec. 1686 (§ 273), Co. Civ. Pro. Cal.

In the case of *Hall vs. Frederick*, 2 P.Wms., p. 356, this rule applied alone to the father, but the text makes no distinction. Such advancements affect the representatives of the one receiving them.—*Proud vs. Turner*, 2 P.Wms., p. 560. Extrinsic evidence is receivable to show the intention of the decedent as to adoptions. *Red. L. of Wills* (ed. 1864), p. 647, Sec. 50; *Chapman vs. Salt*, 2 Vernon, p. 646; *Rosewell vs. Bennett*, 3 Atk., p. 77; *Pile vs. Pile*, 1 Ch. R., p. 199; *Ellison vs. Cookson*, 2 Br. C. C., p. 307; S. C. 3, id., p. 61.

1396. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

Advancements, when too much, or not enough.

NOTE.—Stats. 1850, p. 221, Sec. 6; see, also, *Red. L. of Wills*, pp. 908-10 and notes, and cases there cited. In the case of *Edwards vs. Freeman*, 2 P.Wms., pp. 435-45, the subject is thoroughly discussed. An annuity provided to take effect at the death of the father. (*Proud vs. Turner*, 2 P.Wms., p. 560). If the provision be contingent, it is reckoned an advancement after becoming absolute. This question is considered at length by the author first cited, *supra*, but the text is its own rule, sufficiently clear, and easily understood.

What are
advances-
ments.

1397. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir.

NOTE.—Stats. 1850, p. 221, Sec. 7. See authorities cited in the preceding note.

Value of
advances-
ments, how
determined

1398. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

NOTE.—Stats. 1850, p. 221, Sec. 8. See authorities and cases cited in the note to Sec. 1396, ante.

When heir,
advanced
to, dies
before
decedent.

1399. If any child, or other lineal descendant receiving advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

NOTE.—Stats. 1850, p. 221, Sec. 9. Advancement to the child (heir) "will affect the representatives of such child who come in after his decease and take his place."—Red. L. of Wills (ed. 1866,), Part II, p. 908, Subd. 19; Proud vs. Turner, 2 P. Wms., p. 560; see notes to Secs. 1395, 1396, ante.

Inherit-
ance of
husband
and wife
from each
other.

1400. The provisions of the preceding sections of this Title, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents.

NOTE.—Stats. 1850, p. 221, Sec. 10.

1401. Upon the death of the wife, the entire community property, without administration, belongs to the

surviving husband, if he shall not have abandoned and lived separate and apart from her; but if the husband shall have abandoned his wife, and lived separate and apart from her, the half of the community property, subject to the payment of the debts chargeable to it, is at her testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs at law, exclusive of her husband.

Distribution of the common property in case of death of the wife.

NOTE.—Stats. 1863-4, p. 363, Sec. 1. Unless the contrary appears, all property acquired during coverture is presumed to be (community) common property.—*Althof vs. Conheim*, 38 Cal., p. 230. Before the adoption of the Codes the term "common property" was almost invariably used to signify property belonging to the community relation of husband and wife; the term used in the Codes is "community," in the place of "common" property. On the subject of what is community property, see, generally, *Buchanan's Estate*, 8 Cal., p. 507; *Johnson vs. Johnson*, 11 id., p. 201; *Smith vs. Smith*, 12 id., p. 216; *Meyer vs. Kinzer*, 12 id., p. 247. Approved as to common (community) property, in *Scott vs. Ward*, 13 id., p. 470; *Pixley vs. Huggins*, 15 id., p. 131; *Kohner vs. Ashneauer*, 17 id., p. 581; *Benton vs. Lies*, 21 id., p. 91; *Adams vs. Knowlton*, 22 id., p. 288; *Tustin vs. Faught*, 23 id., p. 241; *Landers vs. Bolton*, 26 id., p. 420. "As to presumption" approved, in *Smith vs. Smith*, 12 id., p. 224; *Mott vs. Smith*, 16 id., p. 557; *McDonald vs. Badger*, 23 id., p. 398; *Ramsdell vs. Fuller*, 28 id., p. 42; *Peck vs. Vandenberg*, 30 id., p. 42; see, also, Secs. 162, 163, 164, ante, and notes.

1402. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the

Distribution of common property on death of the husband.

death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

NOTE.—Stats. 1863-4, p. 363, Sec. 1. Community property liable for community debts, etc.—Estate of Tompkins, 12 Cal., p. 114. And for husband's debts.—Adams vs. Knowlton, 22 Cal., p. 283. Dower is done away with by our statute.—Beard vs. Knox, 5 Cal., p. 252. Money consideration for deed to wife, considered in Mott vs. Smith, 16 Cal., p. 533. Increase in community property.—Lewis vs. Lewis, 18 Cal., p. 654. Difference between original stock and the stock as increased, constitutes the community property. By Mexican law, product of wife's labor community property.—Fuller vs. Ferguson, 26 Cal., p. 546. Husband's power over community property.—See Beard vs. Knox, 5 Cal., p. 252; Smith vs. Smith, 12 Cal., p. 216. Husband's power absolute, wife's in expectancy.—Van Maren vs. Johnson, 15 Cal., p. 308. This was prior to passage of Act referred to first supra. Of course the rule as stated in the text is different.

Inheritance by representation.

1403. Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

NOTE.—Stats. 1850, p. 221, Sec. 11. The heir represents his ancestor.—Bacon Abr., "Heir and Ancestor" (A). Representation was unknown to the Romans, and was invented by the commentators and doctors of the civil law.—Toullier Dr. Civ. Fr., liv. 3, t. l. c. 3, n. 180; see Aylliffe Pand., p. 397; Dalloz Dict., "Succession," Art. 4, Sec. 2; Bouvier L. Dict., Title "Representation of Persons;" see Sec. 1383, ante, and note; also, Secs. 698-739 and notes, ante, on the subject of "Posthumous Child."

Aliens may inherit, when, and how.

1404. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this Title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by

succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

NOTE.—Const., Art. I, Sec. 17; Stats. 1856, p. 137, Sec. 1; *State vs. Rogers*, 13 Cal., p. 159; see, also, Secs. 671, 672, ante, and notes, with numerous references to California decisions.

1405. When succession is not claimed as provided in the preceding section, the District Court, on information, must direct the Attorney General to reduce the property to his or the possession of the State, or to cause the same to be sold, and the same or the proceeds thereof to be deposited in the State Treasury for the benefit of such non-resident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof to the satisfaction of the State Controller and Treasurer is produced that he is entitled to succeed thereto.

Succession not claimed, Attorney General to cause to be sold, and proceeds deposited.

NOTE.—Stats. 1856, p. 137, Sec. 1. By the civil, as well as by the common law, the King cannot take upon himself the possession of an estate said to have escheated until the fact is judicially ascertained by an inquest of office.—*The People vs. Folsom*, 5 Cal., p. 373. An alien cannot be deprived of his land or incidents thereto by proof of alienage in a collateral proceeding.—*Ramirez vs. Kent et al.*, 2 Cal., p. 558. Alien's estate does not vest in the sovereign until "office found," etc.—*Morris vs. Hoyt*, 18 Cal., p. 217.

1406. When so claimed, the evidence and the joint order of the Controller and Treasurer must be filed by the Treasurer as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the State, and is placed by the State Treasurer to the credit of the School Fund.

When the property and estate escheat to the State.

NOTE.—Stats. 1856, p. 137, Sec. 1. See note to preceding section.

Property
escheated
subject to
charges as
other
property.

1407. Real property passing to the State under the last section, whether held by the State or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of Title VIII, Part III, of the CODE OF CIVIL PROCEDURE.

NOTE.—Stats. 1870, p. 72, Sec. 1; 1862, p. 103, Sec. 2, et seq.; 1855, p. 222, Sec. 1, et seq. See, also, note to Sec. 1405, ante.

Successor
liable for
decendent's
obligations.

1408. Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the CODE OF CIVIL PROCEDURE.

NOTE.—See Title XI, Part III, Co. Civ. Pro. Cal.

TITLE VIII.

WATER RIGHTS.

SECTION 1410. Rights to water may be acquired by appropriation.

- 1411. Appropriation must be for a useful purpose.
- 1412. Point of diversion may be changed.
- 1413. Water may be turned into natural channels.
- 1414. First in time, first in right.
- 1415. Notice of appropriation.
- 1416. Diligence in appropriating.
- 1417. Completion defined.
- 1418. Doctrine of relation applied.
- 1419. Forfeiture.
- 1420. Rights of present claimant.
- 1421. Recorder to keep book in which to record notices.
- 1422. This Title not to affect rights of riparian proprietors.

Rights to
water may
be acquired
by appro-
priation.

1410. The right to the use of running water flowing in a river or stream or down a cañon or ravine may be acquired by appropriation.

NOTE.—Eddy vs. Simpson, 3 Cal., p. 249; Irwin vs. Phillips, 5 Cal., p. 140; Kidd vs. Laird, 15 Cal., p. 161; Hoffman vs. Stone, 7 Cal., p. 49; McDonald vs. Bear River Co., 13 Cal., p. 220; Ortman vs. Dixon, 13 Cal., p. 34; Rupley vs. Welch, 23 Cal., p. 452; McDonald

vs. Askew, 29 Cal., p. 200; Nevada Water Co. vs. Powell, 34 Cal., p. 109; Davis vs. Gale, 32 Cal., p. 28. Water flowing in a ditch is not the subject of (actual) mechanical partition. A sale and distribution is the only partition which can be made by a Court.—McGillivray vs. Evans, 27 Cal., p. 92.

1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Appropriation must be for a useful purpose.

NOTE.—Weaver vs. Eureka Lake Co., 15 Cal., p. 271; McKinney vs. Smith, 21 Cal., p. 374; Hill vs. Smith, 27 Cal., p. 476; American Co. vs. Bradford, 27 Cal., p. 360; Ortman vs. Dixon, 13 Cal., p. 34; McDonald vs. Bear River Co., 13 Cal., p. 220; Davis vs. Gale, 32 Cal., p. 22; Nevada Water Co. vs. Powell, 34 Cal., p. 109.

1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

Point of diversion may be changed.

NOTE.—Kidd vs. Laird, 15 Cal., p. 161; Butte Table Mountain Co. vs. Morgan, 19 Cal., p. 609; Union Water Company vs. Crary, 25 Cal., p. 504.

1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

Water may be turned into natural channels.

NOTE.—Richardson vs. Kier, 34 Cal., p. 63; Butte Canal and Ditch Company vs. Vaughan, 11 Cal., p. 143; Hoffman vs. Stone, 7 Cal., p. 46.

1414. As between appropriators, the one first in time is the first in right.

First in time, first in right.

NOTE.—Butte Canal and Ditch Co. vs. Vaughan, 11 Cal., p. 143; Kidd vs. Laird, 15 Cal., p. 161; Weaver vs. Conger, 10 Cal., p. 233; B. R. and A. W. and M. Co. vs. N. Y. Co., 8 Cal., p. 327; Hill vs. King, 8 Cal., p. 336; Davis vs. Yale, 32 Cal., p. 26; Eddy vs. Simp-

son, 3 Cal., p. 249; Irwin vs. Phillips, 5 Cal., p. 140; Maeris vs. Bicknell, 7 Cal., p. 261; McDonald vs. Askew, 29 Cal., p. 200; Ortman vs. Dixon, 13 Cal., p. 33; Phoenix Water Co. vs. Fletcher, 23 Cal., p. 481; see Sec. 3525, post.

Notice of
appropriation.

1415. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;

2. The purposes for which he claims it, and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it;

A copy of the notice must, within ten days after it is posted, be recorded in the office of the Recorder of the county in which it is posted.

NOTE.—Thompson vs. Lee, 8 Cal., p. 275; Weaver vs. Eureka Lake Co., 15 Cal., p. 271; Kimball vs. Gearhart, 12 Cal., p. 27; Parke vs. Kilham, 8 Cal., p. 77.

Diligence
in appropriating.

1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

NOTE.—Kimball vs. Gearhart, 12 Cal., p. 27; Weaver vs. Eureka Lake Co., 15 Cal., p. 271; Thompson vs. Lee, 8 Cal., p. 275.

Completion
defined.

1417. By "completion" is meant conducting the waters to the place of intended use.

Doctrine of
relation
applied.

1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

NOTE.—Kimball vs. Gearhart, 12 Cal., p. 27; Weaver vs. Eureka Lake Co., 15 Cal., p. 271.

1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith. Forfeiture.

NOTE.—As to construction of “rules” under which a forfeiture of possessory interests is claimed, see *Colman vs. Clements*, 23 Cal., p. 245; *Wiseman vs. McNulty*, 25 Cal., p. 230; *St. John vs. Kidd*, 26 Cal., p. 263; *Packer vs. Heaton*, 9 Cal., p. 568; *McGarrity vs. Byington*, 12 Cal., p. 426.

1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this Title takes effect, and within twenty days thereafter, proceed as in this Title provided, or their right ceases. Rights of present claimant.

1421. The Recorder of each county must keep a book, in which he must record the notices provided for in this Title. Recorder to keep book in which to record notices.

1422. The rights of riparian proprietors are not affected by the provisions of this Title. This Title not to affect rights of riparian proprietors

NOTE.—Under the provisions of “An Act to put into effect the provisions of the Civil Code relative to water rights,” approved March 27th, 1872 (Stats. 1871-2, p. 622), this Title was put into force and effect from and after the 1st day of May, 1872. In Stats. 1871-2, pp. 945-948, will also be found:

An Act to promote irrigation.

[Approved April 1, 1872.]

[Enacting clause.]

SECTION 1. Whenever the owners of any body of lands susceptible of one mode of irrigation or drainage desire to irrigate or drain the same, they may present to the Board of Supervisors of the county in which the lands or the greater portion thereof are situated, at a regular meeting of the Board, a petition setting forth that they desire to adopt measures to irrigate the same, the description of the lands by legal subdivisions, the number of acres in the whole district, and the number of acres in each tract, with the names of the owners

thereof and the names of three persons who may desire to serve as Trustees for the first three months.

SEC. 2. The petition must be verified by the affidavit of one of the petitioners, and must be published for four weeks next preceding the hearing thereof, in some newspaper published in the county in which the lands are situated; or, if there is no newspaper published in the county, then it must be published in some newspaper having a general circulation in the county, and an affidavit of publication must be filed with such petition.

SEC. 3. When a district is situated partly in different counties, the Trustees must, after the petition has been granted, forward a copy thereof to the Clerk of the Board of Supervisors of each of the counties in which any portion of the district may lie, and the Board to which the same is forwarded must not allow another district to be formed within such district unless with the consent of the Trustees thereof.

SEC. 4. If the Board of Supervisors find upon the hearing of the petition that the statements are correct, and that no land is improperly included or excepted from the district, they must note their approval on the petition, which approval must be signed by the President and attested by the Clerk; and from and after the approval the district is duly formed, and the persons named in the petition are the Trustees for the first three months, and until their successors are appointed.

SEC. 5. The petition must then be recorded by the County Recorder in a book kept for the purpose.

SEC. 6. After the approval of the petition, the petitioners may make such by-laws as they deem necessary for future appointment of Trustees and to effect the works of irrigation or drainage, keep the same in repair and operation, and for the control and management thereof, by the votes or consent of a majority of the owners of the lands within their district.

SEC. 7. The by-laws adopted must be signed by persons owning a majority of the land within the district, and must be recorded by the County Recorder in the same book and immediately following the petition.

SEC. 8. The Board thus formed have power to elect one of their number President thereof, and to employ engineers to survey, plan, locate, and estimate the cost of the works necessary for the irrigation, the water rights needed, and the land needed for right of way, including drains, canals, sluices, water gates, embankments, and material for construction, and to construct,

maintain, and keep in repair all works necessary to the object in view.

SEC. 9. The Board of Trustees must report to the Board of Supervisors of the county, or if the district is in more than one county then to the Board of Supervisors of each county in which the district is situated, the plans of the work and estimates of the costs, together with estimates of the incidental expenses of superintendence, repairs, etc.

SEC. 10. The Board by which the district was formed must appoint three Commissioners, disinterested persons, resident of the county in which the district or some part thereof is situated, and must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works, which charge must be collected and paid into the County Treasury as hereinafter provided, and must be placed by the Treasurer to the credit of the district, and paid out for the work of irrigation or drainage upon the warrants of the Trustees, approved by the Board of Supervisors of the county.

SEC. 11. The warrants drawn by the Trustees must, after they are approved by the Board of Supervisors, be presented to the Treasurer of the county, and, if they are not paid on presentation, like indorsement must be made thereon, and they must be registered in like manner as county warrants.

SEC. 12. If a district is situated partly in different counties, the charge must be paid into the Treasury of the county in which the particular tract may be situated.

SEC. 13. If the original assessment is insufficient to provide for the complete irrigation or drainage of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance, and repair of the works, the Trustees must present to the Board of Supervisors by which the district was formed a statement of the work to be done and its estimated cost, and the Board must make an order directing the Commissioners who made the original assessment, or other Commissioners to be named in such order, to assess the amount of such estimated cost as a charge upon the lands within the district, which assessment must be made and collected in the same manner as the original assessment.

SEC. 14. The Commissioners appointed by the Board of Supervisors must make a list of the charges assessed against each tract of land.

SEC. 15. The list must contain:

First—A description, by legal subdivisions or natural boundaries, of each tract assessed;

Second—The number of acres in each tract;

Third—The names of the owners of each tract, if known, and if unknown, that fact;

Fourth—The amount of the charge assessed against each tract.

SEC. 16. The list so made must be filed with the County Treasurer of the county, or if the district is partly situated in different counties, then the original list must be filed in the county first in order under alphabetical arrangement, and copies thereof, certified by the Commissioner, must be filed with the Treasurer of each of the other counties.

SEC. 17. From and after the filing of the list, or certified copy thereof, the charges assessed upon any tract of land within the county constitutes a lien thereon.

SEC. 18. The lists thus prepared must remain in the office of the Treasurer for thirty days, or longer if ordered by the Board of Trustees, and during the time they so remain any person may pay the amount of the charge against any tract to the Treasurer, without cost.

SEC. 19. If, at the end of thirty days, or of the longer time fixed by the Trustees, all of the charges have not been paid, the Treasurer must return the lists to the District Attorney, who must at once proceed by civil action to collect such charges.

SEC. 20. The work must be executed under the direction and in the manner prescribed by the Board of Trustees.

SEC. 21. The Board must keep accurate accounts of all expenditures, which accounts, and all contracts that may be made by them, are open to the inspection of the Board of Supervisors, and every person interested.

SEC. 21. The Trustees may acquire, by purchase, all property necessary to carry out and maintain the system of irrigation or drainage provided for.

SEC. 22. The Trustees may acquire by condemnation:

First—The right to the use of any running water not already used for culinary or domestic purposes, or for irrigating, milling, or mining purposes;

Second—The right of way for canals, drains, embankments, and other work necessary, and may take materials for the construction, maintenance, and repair thereof, from lands outside of as well as within the limits of the district.

SEC. 23. The provisions of Title VII, Part III of the Code of Civil Procedure are applicable to, and the condemnation herein provided for must be made thereunder.

SEC. 24. Whenever any district susceptible of one mode of irrigation or drainage is entirely owned by parties who desire to irrigate or drain the same, and to manage the irrigation or drainage without the intervention of Trustees or the establishment of by-laws, they may file the petition provided for in sections one and two, and must state therein that they intend to undertake the irrigation or drainage on their own responsibility.

SEC. 25. If the petition is granted, the owners of the lands have all the rights, immunities, and privileges granted to Boards of Trustees, and in all proceedings the names of the owners may be used instead of the names of Trustees.

SEC. 26. This Act shall not be so construed as applying to the Counties of Fresno, Kern, Tulare, and Yolo.

SEC. 27. This Act, and the provisions of the Title of the Code of Civil Procedure herein referred to, so far as proceedings under this Act are to be had, shall be in force from and after the passage of this Act.

DIVISION THIRD.

PART I. OBLIGATIONS IN GENERAL.

II. CONTRACTS.

III. OBLIGATIONS IMPOSED BY LAW.

IV. OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.



PART I.

OBLIGATIONS IN GENERAL.

TITLE I. DEFINITION OF OBLIGATIONS.

II. INTERPRETATION OF OBLIGATIONS.

III. TRANSFER OF OBLIGATIONS.

IV. EXTINCTION OF OBLIGATIONS.

TITLE I.

DEFINITION OF OBLIGATIONS.

SECTION 1427. Obligation, what.

1428. How created.

1427. An obligation is a legal duty, by which a person is bound to do or not to do a certain thing. Obligation,
what.

NOTE.—For general definitions of the term obligation, see Bouv. Inst., pp. 3, 14; Coke Litt., p. 172; Comyns Digest, *Obligation* (A.); 2 Serg. & R. Penn., p. 502; 1 Blackf. Ind., p. 241; 6 Vt., p. 40; Harp. So. C., p. 434; 1 Bald. C. C., p. 129. The Federal and State Constitutions (U. S. Const., Art. I, Sec. 10, and State Const., Art. I, Sec. 16,) contain clauses prohibiting the passage by a State of any law "impairing the *obligation* of contracts."—See *Dewey vs. Lambier*, 7 Cal., p. 347. This, however, does not affect the power of Congress to pass such laws.—*Evans vs. Eaton*, Pet. C. C., p. 322. The question as to the meaning of the term "*obligation*" has been much discussed. What does the term *obligation*, in the clause referred to, include? Says Parsons, in his work on Contracts (p.

555,): "The importance of the question rests mainly on the distinction which has been drawn between the laws of a State which were in force at the time the contract was made, and those which are subsequently enacted. The latter may certainly impair this 'obligation,' while the former, it is contended, certainly cannot, because all existing laws enter into contracts made under them, and define and determine that contract." Thus insolvent laws of a State affect only contracts made after the passage of the law. It is generally settled that these clauses cannot limit or affect the power of the State to enact general police regulations for the preservation of public health or morals, and such general laws are not within the prohibition of the Constitution.—Parsons on Contracts, p. 556. "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the *obligation* of his contract."—Sturges vs. Crowninshield, 4 Wheat., p. 122. In case of Ogden vs. Saunders, 12 Wheat., pp. 257, 259, Justice Washington, citing the above extract, says: "What is it, then, which constitutes the *obligation* of a contract? * * * * It is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge. It is, then, the municipal law of the State, whether written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced." Justice Thompson, in the same case, citing the extract from Sturges vs. Crowninshield, says: "That is as I understand it; *the law of the contract forms its obligation*; and if that is so, the contract is fulfilled and its obligation is discharged by complying with whatever the existing law required in relation to such contract." And Trimble, Justice, in same case, also says: "The *obligation* of the contract consists in the *power and efficiency* of the law which applies to and enforces performance of the contracts, or the payment of an equivalent for non-performance. The *obligation* does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term obligation."

"The legal *obligation* of a contract consists in the remedy given by law to enforce its performance or to

make compensation for the failure to perform it."—*Johnson vs. Higgins*, 3 Met. (Ky.), p. 566.

"Right and obligation are considered by all ethical writers as correlative terms. Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to bestow. The *obligation* of every contract will, then, consist of that right or power over my will or actions which I, by my contract, confer on another."—12 Wheat., p. 281, per Johnson, J.

"Contracts have consequently an intrinsic obligation. No State shall 'pass any law impairing the obligation of contracts.' These words seem to us to import that the obligation is intrinsic; that it is created by the contract itself; not that it is dependent on the laws made to enforce it."—12 Wheat., pp. 350-3, per Marshall, C. J.

It is well settled that the contracts designed to be protected are contracts by which *perfect rights*—certain definite, fixed private rights of property—are *vested*.—Sedgwick on Stat. and Const. Law, p. 618; *Butler vs. Pennsylvania*, 10 How., p. 416. And these are *rights*, distinguished from *engagements* undertaken by the State Government for the benefit of all, and which may be varied or discontinued as the public good may require.—Id., and cases there cited.

It has been held that the provision of the Constitution, that no law shall be passed impairing the obligation of contracts, refers only to obligations between individuals, and that it does not refer to contracts between individuals and the State.—*Myers vs. English*, 9 Cal., p. 341; and in *Cohen vs. Wright*, 22 Cal., p. 320, it is held that "contracts between the State and individuals in public offices are not within the constitutional provision prohibiting the passage of a law impairing the obligation of contracts." Probably this is not now the law. In the case of *McCauley vs. Brooks*, 16 Cal., p. 30, the question is fully argued and the conclusion arrived at is, "that a State has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals." This overrules the case of *Myers vs. English*, 9 Cal., p. 341, and it is probable that the portion of the decision in the case of *Cohen vs. Wright*, above cited (22 Cal. p. 320), was a mistake of the Justice delivering the opinion.—See *Beaudry vs. Valdez*, 32 Cal., p. 278, commenting on case of *McCauley vs. Brooks*. Says Mr. Smith, in his *Commentaries on Statute and Constitutional Law*, Sec. 252: "It is immaterial whether the contract be one

between a State and an individual, or between individuals only. * * * The obligations imposed and the rights acquired by virtue of the contract cannot be impaired." This is supported by the best authority.—See *Green vs. Biddle*, 8 Wheat., p. 1; *Fletcher vs. Peck*, 6 Cranch, p. 87; *Providence Bank vs. Billings et al.*, 4 Pet., p. 514; *Dartmouth College vs. Woodward*, 4 Wheat., p. 518; *Tuolumne Redemption Co. vs. Sedgwick*, 15 Cal., p. 515; *State of Cal. vs. McCauley*, 15 Cal., p. 429.

But the Legislature of a State may alter or abridge the term of an office of purely legislative character, increase or diminish the salary of the incumbent during his term, or repeal the law creating such office; and this is not within the constitutional inhibition.—*Myers vs. English*, 9 Cal., p. 341; *Cohen vs. Wright*, 22 Cal., p. 320; *People vs. Haskell*, 5 Cal., p. 537; *Attorney General vs. Squires*, 14 Cal., p. 17; *Brodie vs. Campbell*, 17 Cal., p. 20; *Connor vs. City of N. Y.*, 1 Selden, p. 285; *Warner vs. The People*, 2 Denio, p. 272; *Field vs. The People*, 2 Scammon, p. 79; *Dall vs. The Governor*, 3 Stewart, p. 387; see, also, "Contracts," post.

How
created.

1428. An obligation arises either from:

1. The contract of the parties; or,
2. The operation of law.

TITLE II.

INTERPRETATION OF OBLIGATIONS.

CHAPTER I. *General Rules of Interpretation.*

II. *Joint or Several Obligations.*

III. *Conditional Obligations.*

IV. *Alternative Obligations.*

CHAPTER I.

GENERAL RULES OF INTERPRETATION.

SECTION 1429. General rules.

1429. The rules which govern the interpretation of contracts are prescribed by Part II of this Division. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted.

General
rules.

NOTE.—Obligations may be divided into three classes, arising respectively out of contract, common law, or statute. Those which are imposed by the common law explain themselves, their interpretation being a part of their essential nature. Contracts are interpreted by rules which differ materially from the rules governing the interpretation of statutes, and the two sets of rules, therefore, could not well be united in one Chapter.

CHAPTER II.

JOINT OR SEVERAL OBLIGATIONS.

SECTION 1430. Obligations, joint or several, etc.

1431. When joint.

1432. Contribution between joint parties.

1430. An obligation imposed upon several persons, or a right created in favor of several persons, may be:

Obligations, joint
or several,
etc.

1. Joint;
2. Several; or,
3. Joint and several.

NOTE.—*Subd. 1.*—See *People vs. Hartley*, 21 Cal., p. 585; *Tevis vs. Randall*, 6 Cal., p. 632. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only.—*Sacramento vs. Dunlap*, 14 Cal., p. 421. But such is not the case on a joint and several bond (*id.*), nor upon undertakings under our system (*id.*)

Subd. 3.—This is the admitted rule so far as the *liability* of parties is concerned.—*Peckham vs. North Parish*, 16 Pick., p. 283; *Ludlow vs. McCrea*, 1 Wend., p. 228. As to the *rights* of parties in whose favor a contract is made, an arbitrary exception has been made, according to which their rights cannot be joint and several.—*Anderson vs. Martindale*, 1 East., p. 497;

Hopkinson vs. Lee, 6 Q. B., p. 964; see Bradburne vs. Botfield, 14 M. & W., p. 573; Keightley vs. Watson, 3 Exch., p. 721. This exception is purely arbitrary, and although cases are rare in which parties would desire to avail themselves of their liberty to enter into such a contract, there is not any good reason for denying them that liberty. In other respects this section follows the ruling of the English Court of Exchequer in Sorsbie vs. Park, 12 M. & W., p. 140; Keightley vs. Watson, 3 Exch., p. 716.

What is a joint and several bond?—People vs. Love, 25 Cal., p. 520; Canfield vs. Bates, 13 Cal., p. 606. As to enforcement of obligations against joint or joint and several obligors, see Code of Civil Procedure, Secs. 414, 989.

When joint 1431. An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the Title on the Interpretation of Contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

NOTE.—"Is presumed to be joint and not several." See Yorks vs. Peck, 14 Barb., p. 644; Hill vs. Tucker, 1 Taunt., p. 7. See Secs. 1659, 1660, post. In an action on a promissory note against several joint makers, neither can show in defense that as between him and the other joint makers he was only a surety.—Shriver vs. Lovejoy, 32 Cal., p. 574.

Contribution between joint parties. 1432. A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

NOTE.—Where one of two defendants in a joint judgment pays it, but not with the intention of discharging it, he may enforce the judgment against the co-defendant for his legal proportion of the debt.—Coffee vs. Tevis, 17 Cal., p. 239; see, also, Bradbury vs. Barnes, 19 Cal., p. 120; Story Cont., Sec. 33; Wood vs. Merritt, 2 Bosw., p. 368; Parker vs. Ellis, 2 Sand., p. 223; but see Murray vs. Bogert, 14 Johns., p. 318. The doctrine of contribution applies equally between those who are jointly bound on their own account (not being co-partners), as it does between co-sureties, or those

who are jointly bound to answer for the debt or default of another.—*Chipman vs. Merrill*, 20 Cal., p. 130. A party must satisfy the obligation, and must establish a claim against his joint obligor, before the liability of such joint obligor is fixed.—*Bell vs. Walsh*, 7 Cal., p. 84. In an action for contribution, the Statute of Limitation does not begin to run until after the payment of the debt by the plaintiff.—*Sherwood vs. Dunbar*, 6 Cal., p. 53.

CHAPTER III.

CONDITIONAL OBLIGATIONS.

SECTION 1434. Obligation, when conditional.

- 1435. Conditions, kinds of.
- 1436. Conditions precedent.
- 1437. Conditions concurrent.
- 1438. Condition subsequent.
- 1439. Performance, etc., of conditions, when essential.
- 1440. When performance, etc., excused.
- 1441. Impossible or unlawful conditions void.
- 1442. Conditions involving forfeiture, how construed.

1434. An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event. Obligation,
when
conditional

NOTE.—Whether a contract is conditional or not, is to be determined by the rules of interpretation hereafter given. The intention of the parties, as gathered from the whole contract, is superior to all technical rules. *Parmelee vs. Oswego, etc.*, R. R. Co., 6 N. Y., p. 74; *Selden vs. Pringle*, 17 Barb., p. 458; *Barruso vs. Madan*, 2 Johns., p. 145; see *Tipton vs. Feitner*, 20 N. Y., p. 423; *Grant vs. Johnson*, 5 id., p. 247; *Glaholm vs. Hays*, 2 Man. & Gr., p. 266. And these cases cited give instances of conditions when precedent and when subsequent. See note to Sec. 1442, post.

1435. Conditions may be precedent, concurrent, or subsequent. Conditions,
kinds of

NOTE.—See note to preceding section, and cases cited.

Conditions
precedent.

1436. A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

NOTE.—See notes to Secs. 707 and 708, ante; and further, for examples of conditions precedent and subsequent, see *Tipton vs. Feitner*, 20 N. Y., p. 423; *Grant vs. Johnson*, 5 id., p. 247; *Parmelee vs. Oswego, etc.*, R. R. Co., 6 id., p. 74; *Oakley vs. Morton*, 11 id., p. 25; *Goodwin vs. Holbrook*, 4 Wend., p. 377; *Weisser vs. Maitland*, 3 Sand., p. 318; *Ellen vs. Topp*, 6 Exch., p. 424; *Graves vs. Legg*, 9 Exch., p. 709.

Conditions
concurrent.

1437. Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.

NOTE.—*Conant vs. Conant*, 10 Cal., p. 254. See note to Sec. 708, ante, "mutual covenants;" and also, see *Beecher vs. Conradt*, 13 N. Y., p. 108; *Dunham vs. Pettee*, 8 id., p. 508; *Lester vs. Jewett*, 11 id., p. 453; *Kelley vs. Upton*, 5 Duer, p. 336; *Williams vs. Healey*, 3 Den., p. 363.

Condition
subsequent.

1438. A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

NOTE.—See note to Sec. 708, ante; also, *Miller vs. Steen*, 34 Cal., p. 138; *Nicoll vs. N. Y. & Erie R. R. Co.*, 12 N. Y., pp. 121, 130, and cases cited in notes to Secs. 1434, 1436, and 1437, ante.

Perform-
ance, etc.,
of
conditions,
when
essential.

1439. Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section.

NOTE.—"Must fulfill all conditions precedent thereto," etc.—*Conant vs. Conant*, 10 Cal., p. 254. A condition precedent must be *strictly* performed to entitle a person to recover. Performance is not excused by inevitable accident. In a case where A agreed that he would keep twenty cows during dairy

season, and until the end of November, and that he would sell the butter made to B, to be delivered at a time and place specified, at a certain price per pound, and B agreed to pay for the butter delivered. About two months before the end of dairy season three of the cows ceased to give milk, and A thereupon sold them, having left on his dairy only seventeen cows. *Held*: A could not sustain an action on the contract.—*Oakley vs. Morton*, 11 N. Y., p. 25. Where, in a contract for the erection of a building upon the land of another, performance is to precede payment and is the condition thereof, the builder having substantially failed to perform on his part can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection. A party is entitled in such a case to retain without compensation the benefits of a partial performance.—*Smith vs. Brady*, 17 N. Y., p. 173; see, also, *Cunningham vs. Jones*, 20 id., p. 486; *Grant vs. Johnson*, 5 id., p. 247; *Catlin vs. Tobias*, 26 id., p. 217; *Ellen vs. Topp*, 6 Exch., p. 424; and see case of *Chater vs. S. F. Sugar Refining Co.*, 19 Cal., p. 219; also, *O'Connor vs. Dingley*, 26 Cal., p. 11. "Must be able and offer to fulfill all conditions concurrent," etc.—See *Barron vs. Frink*, 30 Cal., p. 486; *Osborne vs. Elliott*, 1 Cal., p. 337; *People vs. Jackson*, 24 Cal., p. 632; *Beecher vs. Conradt*, 13 N. Y., p. 108; *Dunham vs. Pettee*, 8 id., p. 508; *Lester vs. Jewett*, 11 id., p. 453; *Reddington vs. Chase*, 34 Cal., p. 666; *Salmon vs. Hoffman*, 2 Cal., p. 138. When one party offers to fulfill his part in a concurrent obligation and the other refuses or neglects to perform his part, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, even if it is not certain which is obliged to do the first act.—*Platt. Covenants*, p. 71; 2 *Selwyn Nisi P.*, p. 443; *Dougl.*, p. 698; 18 *Eng. L. & Eq.*, p. 81; 1 *Wash. C. C.*, p. 714; 16 *Mo.*, p. 450. And generally as to the performance of conditions precedent and what they are, see *Dudley vs. Thomas*, 23 Cal., p. 365; *Middleton vs. Ballingall*, 1 Cal., p. 446; *Brannan vs. Mesick*, 10 Cal., p. 95; *Cayton vs. Walker*, 10 Cal., p. 450; *Mesick vs. Sunderland*, 6 Cal., p. 297; *Kinkead vs. Shreve*, 17 Cal., p. 275; *Smith vs. Compton*, 6 Cal., p. 24; *Rogers vs. Cody*, 8 Cal., p. 324; *Bensley vs. Atwill*, 12 Cal., p. 231; *Gibbons vs. Scott*, 15 Cal., p. 284; *Palmer vs. Vance*, 13 Cal., p. 553; *Folsom vs. Bartlett*, 2 Cal., p. 163; *Vance vs. Dingley*, 14 Cal., p. 53. Concurrent and dependent conditions, see *Smith vs. B. & M. R. R.*, 6 *Allen*, p. 262.

When performance,
etc.,
excused.

1440. If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.

NOTE.—*Cornwell vs. Haight*, 21 N. Y., p. 462; *Skinner vs. Tinker*, 34 Barb., p. 333; *Crist vs. Armour*, id., p. 378; *Clark vs. Crandall*, 27 id., p. 73; *North vs. Pepper*, 21 Wend., p. 636; see *Crary vs. Smith*, 2 N. Y., p. 60.

Impossible
or unlawful
conditions
void.

1441. A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the Article on the Object of Contracts, or which is repugnant to the nature of the interest created by the contract, is void.

NOTE.—“Impossible or unlawful.”—See Sec. 707, ante, et seq.; *Story Cont.*, Sec. 326. “Repugnant to the nature of the interest created.”—*De Peyster vs. Michael*, 6 N. Y., p. 496.

Conditions
involving
forfeiture,
how
construed.

1442. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

NOTE.—*Hitchcock vs. Northwestern Ins. Co.*, 26 N. Y., p. 68; *Doe, D, Abdy vs. Stevens*, 3 B. & Ad., p. 299; *Catlin vs. Springfield Ins. Co.*, 1 Sumner, p. 440.

Compare this Chapter with Sections 707 to 711, ante, and the cases cited in the notes thereto.

CHAPTER IV.

ALTERNATIVE OBLIGATIONS.

SECTION 1448. Who has the right of selection.

1449. Right of selection, how lost.

1450. Alternatives indivisible.

1451. Nullity of one or more of alternative obligations.

1448. If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

Who has
the right of
selection.

NOTE.—McNitt vs. Clarke, 7 Johns., p. 465, and cases there cited; Smith vs. Sanborn, 11 Johns., p. 59; Disbrough vs. Neilson, 3 Johns. Cas., p. 81; Small vs. Quincy, 4 Greenl., p. 497.

1449. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

Right of
selection,
how lost.

NOTE.—Sage vs. Hazard, 6 Barb., p. 179; McNitt vs. Clarke, 7 Johns., p. 465, and cases cited; Brooke Abr. Dette, p. 159; Choice vs. Moseley, 1 Bailey, p. 136; Townsend vs. Wells, 3 Day, p. 327. Where a note was payable in specific articles, to be delivered at a day named, a timely selection of the articles to be made by the payee, and the latter makes no selection, but prior to the time for payment instructs the maker not to send any until he gives notice what articles he wants, the payee, by such instructions, does not lose his right of selection *unless* the maker, before such right is exercised, has paid the amount of the note in articles of his own selection; and where the note remained unpaid two years after it became due, and the payee then named the articles, and demanded them, the maker, failing to comply with the demand within a reasonable time, was liable on his contract.—Gilbert vs. Danforth, 6 N. Y., pp. 585-592.

1450. The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.

Alternatives
indivisible.

1451. If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful, or impossible of performance, the

Nullity of
one or more
of alternative
obligations.

obligation is to be interpreted as though the other stood alone.

NOTE.—Esposito vs. Bowden, 4 Ellis & Black., p. 963.

TITLE III.

TRANSFER OF OBLIGATIONS.

SECTION 1457. Burden of obligation not transferable.

1458. Rights arising out of obligation transferable.

1459. Non-negotiable instruments may be transferred.

1460. Covenants running with land, what.

1461. What covenants run with land.

1462. Same.

1463. Same.

1464. What covenants run with land when assigns are named.

1465. Who are bound by covenants.

1466. Who are not.

1467. Apportionment of covenants.

Burden of
obligation
not trans-
ferable.

1457. The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except as provided by Section 1466.

NOTE.—This is as true of covenants running with the land as of any other obligations. The original covenantor remains liable to the covenantee, notwithstanding that the land passes into other hands.—House vs. Burr, 24 Barb., p. 525; Damb vs. Hoffman, 3 E. D. Smith, p. 361; Port vs. Jackson, 17 Johns., pp. 239, 479; Jackson vs. Brownson, 7 id., p. 227. So, where one has agreed to perform a service, he cannot compel the other party to accept the service from a third person, and to release him therefrom.—Robson vs. Drummond, 2 B. and Ad., p. 303. It is not meant by this section to imply that a third person cannot assume the obligations of a contract between other parties, but only that he cannot relieve a party thereto from his obligations without the consent of the creditor.

1458. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.

Rights arising out of obligation transferable.

NOTE.—See Sec. 954, ante: Short vs. Spackman, 2 B. and Ad., p. 962; Hitchcock vs. Northwestern Ins. Co., 26 N. Y., p. 68, and cases cited therein; McKee vs. Judd, 12 N. Y., p. 622; Meech vs. Stoner, 19 id., p. 26; see Cal. Steam Nav. Co. vs. Wright, 6 Cal., p. 258; Taylor vs. Palmer, 31 Cal., p. 240; Doll vs. Anderson, 27 Cal., p. 248; Cochrane vs. Collins, 29 Cal., p. 129; Brown vs. Scott, 25 Cal., p. 194; Lawrence vs. Martin, 22 Cal., p. 173. As to splitting demands.—Marziou vs. Pioche, 8 Cal., p. 536; 7 Cal., p. 260; 6 Cush., p. 282; 13 Mo., p. 300; 11 S. and R., p. 78.

1459. A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement.

Non-negotiable instruments may be transferred.

NOTE.—Ryan vs. Maddux, 6 Cal., p. 247. And no particular form of assignment is necessary.—Wiggins vs. McDonald, 18 Cal., p. 126; Wheatley vs. Strobe, 12 Cal., p. 92; but see, also, Ritter vs. Stevenson, 7 Cal., p. 388; see Ritter vs. Stevenson, 11 Cal., p. 27; see Lineker vs. Ayeshford, 1 Cal., p. 75; see Sec. 368 (§ 5), Co. Civ. Pro. Cal.

1460. Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

Covenants running with land, what.

NOTE.—A covenant in a deed, whether express or implied, that the grantor has not sold or incumbered, was held to be a personal covenant, and not running with the land.—Lawrence vs. Montgomery, 37 Cal., p. 183. Certain covenants are implied from the use of the word "grant."—See Secs. 1113, 1115, and notes, ante.

What
covenants
run with
land.

1461. The only covenants which run with the land are those specified in this Title, and those which are incidental thereto.

NOTE.—“Specified in this Title.”—Parties cannot, by any form of words, attach newly invented covenants to real property.—*Keppell vs. Bailey*, 2 Myl. & K., p. 517. The covenant must concern the demised premises and the mode of occupying them.—*Id.* Every covenant to a lease relating to the thing demised attaches to the land and runs with it.—*Laffan vs. Naglee*, 9 Cal., p. 662. A covenant in a lease to the lessee “his heirs and assigns” for a term of eight years, that if the lessor shall sell or dispose of the demised premises the lessee is to be entitled to the refusal of the same, is a covenant running with the land.—*Id.* See, however, *Talmadge vs. East River Bank*, 26 N. Y., p. 105; *Tulk vs. Moxhay*, 2 Phil., p. 774; 11 Beav., p. 571. In these last cases the question was not so much “whether the covenant ran with the land, as whether a party may be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased.” The principle there involved was simply: “If an equity attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”—For this rule see *Patching vs. Dobbins*, 1 Kay, p. 1; *Cole vs. Sims*, id., p. 56; *Runkin vs. Huskinson*, 4 Sim., p. 13; *Watman vs. Gibson*, 9 id., p. 196; *Schreaner vs. Reed*, 10 id., p. 9; consult *Hill vs. Miller*, 3 Paige, p. 254; *Barrow vs. Richard*, 8 Paige, p. 351; *Heriots Hospital vs. Gibson*, 2 Dow., p. 301. The contract of a surety for the payment of rent is annexed to the obligation for the rent, and therefore passes therewith.—*Allen vs. Culver*, 3 Denio, p. 284. This, however, is the necessary result of a principle elsewhere declared (see Sec. 1084, ante.)

Same.

1462. Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land.

NOTE.—When a covenant will be deemed to run with the land, and when it will be considered merely personal or collateral, is fully discussed and considered in *Norman vs. Wells*, 17 Wend., p. 136; and on the

same subject see *Denman vs. Prince*, 40 Barb., p. 213; *Verplanck vs. Wright*, 23 Wend., p. 506; *Myers vs. Burns*, 33 Barb., p. 401; *Jourdain vs. Wilson*, 4 B. & Ald., p. 266; *Vernon vs. Smith*, 5 id., p. 1; *Martyn vs. Clue*, 18 Q. B., p. 661; *Wakefield vs. Brown*, 9 id., p. 209; *Allen vs. Culver*, 3 Denio, p. 284; *Demarest vs. Willard*, 8 Cow., p. 206. Lineal and collateral warranties are abolished by Sec. 1115, ante.

1463. The last section includes covenants "of warranty," "for quiet enjoyment," or for further assurance on the part of a grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee. Same.

NOTE.—"Covenants of warranty."—*Suydam vs. Jones*, 10 Wend., p. 180; *Withy vs. Mumford*, 5 Cow., p. 137; *Mitchell vs. Warner*, 5 Conn., p. 497; *Wyman vs. Ballard*, 12 Mass., p. 306; see, also, *Blackwell vs. Atkinson*, 14 Cal., p. 470. A covenant of non-claim in a deed amounts to the ordinary covenant of warranty.—*Gee vs. Moore*, 14 Cal., p. 472. Where there is covenant of warranty, the payment of the purchase money cannot be resisted, nor even reduced, so long as the grantee remains in possession.—*Norton vs. Jackson*, 5 Cal., p. 262; see *Jackson vs. Norton*, 6 Cal., p. 189; and, also, *Reynolds vs. Harris*, 9 Cal., p. 340; and *Fowler vs. Smith*, 2 Cal., p. 44; also, *Walker vs. Sedgwick*, 8 Cal., p. 398. A covenant warranting the title of land as "indisputable and satisfactory," is not broken if the title is good and valid.—*Winter vs. Stock*, 29 Cal., p. 407. An action for false and fraudulent representation as to the naked fact of title in the vendor of land, cannot be maintained by a purchaser who has taken possession of the premises sold under a conveyance with express covenants.—*Peabody vs. Phelps*, 9 Cal., p. 226; see *Lawrence vs. Montgomery*, 37 Cal., p. 183. What a covenant of general warranty relates to.—*Vance vs. Pena*, 33 Cal., p. 631. "For quiet enjoyment."—*Lewis vs. Campbell*, 8 Taunt., p. 715; *Markland vs. Crump*, 1 Dev. & Bat., p. 94; *Campbell vs. Lewis*, 3 B. & Ald., p. 392; *Noke vs. Awder*, Cro. El., p. 436. Without eviction there is no breach of covenant, but eviction need not be by process of law consequent on a judgment.—*McGary vs. Hastings*, 39 Cal., p. 360. "For further assurance."—*Bennett vs. Waller*, 23 Ill., p. 97; *Colby vs. Osgood*, 29 Barb., p. 339. "On the part of the

grantor."—The covenants mentioned in this section are all the usual covenants that are recognized in this State as running with the land. In *Kingdom vs. Nottle*, 1 M. & Selw., p. 355; 4 id., p. 53, it was held that a covenant of seizin ran with the land; but this decision has been overruled in the Courts of this country.—See *Mitchell vs. Warner*, 5 Conn., p. 497; *Fowler vs. Paling*, 2 Barb., p. 300; *Greenby vs. Wilcocks*, 2 Johns., p. 1; *Ballard vs. Child*, 34 Me., p. 355; *Thayer vs. Clemence*, 22 Pick., p. 490; *Marston vs. Hobbs*, 2 Mass., p. 439. "For the payment of rent."—*Van Rensselaer vs. Read*, 26 N. Y., p. 558; *Van Rensselaer vs. Hays*, 19 N. Y., p. 68; *Astor vs. Lent*, 6 Bosw., p. 612; *Van Rensselaer vs. Bonesteel*, 24 Barb., p. 655; *Close vs. Wilberforce*, 1 Beav., p. 113; *Jenkins vs. Portman*, 1 Keen, p. 435. It is not necessary that the covenant should express an intention to bind the covenantor's assigns.—*Jacques vs. Short*, 20 Barb., p. 269. "Taxes or assessments on land."—*Post vs. Kearney*, 2 N. Y., p. 394; 1 Sandf., p. 105.

What covenants run with land when assigns are named.

1464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

NOTE.—*Spencer's Case*, 5 Co. Rep., p. 16; *Easterby vs. Sampson*, 6 Bing., p. 664; *Sampson vs. Easterby*, 9 B. & C., p. 505. Such covenants will not run with the land, unless "assigns" are mentioned in the deed.—*Spencer's Case*, 5 Co., p. 16; *Tallman vs. Coffin*, 4 N. Y., p. 134; *Thompson vs. Rose*, 8 Cow., p. 266; *Doughty vs. Bowman*, 11 Q. B., p. 444.

Who are bound by covenants.

1465. A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property.

NOTE.—*Davis vs. Morris*, 35 Barb., p. 227; Co. Litt., 385a; *Gee vs. Moore*, 14 Cal., p. 472; *Cadiz vs. Majors*, 33 Cal., p. 289.

1466. No one, merely by reason of having acquired an estate subject to a covenant running with the land,

is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits. Who are
not.

NOTE.—“Before he acquired the estate.”—Day vs. Swackhamer, 2 Hilt., p. 4; Tillotson vs. Boyd, 4 Sandf., p. 516; see Astor vs. Hoyt, 5 Wend., p. 603. “Or after he has parted with it.”—Young vs. Peyser, 3 Bosw., p. 308; Armstrong vs. Wheeler, 9 Cow., p. 88; Childs vs. Clark, 3 Barb. Ch., p. 52; Wolveridge vs. Steward, 3 M. & Scott, p. 561; rev’g S. C., 9 Bing., p. 60; Walker vs. Reeve, 3 Doug., p. 19. “Or ceased to enjoy its benefits.”—Astor vs. L’Amoreux, 4 Sandf., p. 524; Carter vs. Hammett, 18 Barb., p. 608; McIntyre vs. Scott, 8 Johns., p. 169; Eaton vs. Jacques, 1 Doug., p. 461. Although Eaton vs. Jacques has been overruled in England (Williams vs. Bosanquet, 1 Brod. & B., p. 238), its doctrine is law in this State.

1467. Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity. Apportion-
ment of
covenants.

NOTE.—“Subject to the burden.”—Van Rensselaer vs. Bradley, 3 Denio, p. 135; Van Rensselaer vs. Gallup, 5 id., p. 454; Astor vs. Miller, 2 Paige, p. 68. “Entitled to the benefit.”—Cole vs. Patterson, 25 Wend., p. 456. “According to their respective interests in point of quantity.”—Van Rensselaer vs. Jones, 2 Barb., p. 643.

TITLE IV.

EXTINCTION OF OBLIGATIONS.

CHAPTER I. *Performance.*

II. *Offer of Performance.*

III. *Prevention of Performance or Offer.*

CHAPTER IV. *Accord and Satisfaction.*V. *Novation.*VI. *Release.*

CHAPTER I.

PERFORMANCE.

SECTION 1473. Obligation extinguished by performance.

1474. Performance by one of several joint debtors.

1475. Performance to one of joint creditors.

1476. Effect of directions by creditors.

1477. Partial performance.

1478. Payment, what.

1479. Application of general performance.

Obligation
extin-
guished by
perform-
ance.

1473. Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it.

NOTE.—Performance by a third person, without authority from the debtor, does not extinguish the debt. *Muller vs. Eno*, 14 N. Y., p. 605; *Daniels vs. Hallenbeck*, 19 Wend., p. 408; *Bleakley vs. White*, 4 Paige, p. 655. But by any other person on behalf of the debtor, and with his assent.—See *Kemp vs. Balls*, 10 Exch., p. 607; *Jones vs. Broadhurst*, 9 C. B., p. 173; *Belshaw vs. Bush*, 11 C. B., p. 191; *Simpson vs. Eggington*, 10 Exch., p. 845; *James vs. Isaacs*, 12 C. B., p. 791; see *Phillips vs. Berger*, 8 Barb., p. 527; see, particularly, *Myers vs. South F. R. Water Co.*, 14 Cal., p. 268; see, also, note to Sec. 1478, post.

Perform-
ance by one
of several
joint
debtors.

1474. Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all.

NOTE.—But a part payment by one of two joint debtors will not discharge such debtor from the payment of the balance.—*Griffith vs. Grogan*, 12 Cal., p. 314.

1475. An obligation in favor of several persons is extinguished by performance rendered to any of them,

except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the Title on Deposit. Performance to one of joint creditors.

NOTE.—“Rendered to any of them.”—Shepard vs. Ward, 8 Wend., p. 542; see Carman vs. Pultz, 21 N. Y., p. 547. “Except deposit made by owners in common or in joint ownership.”—See Husband vs. Davis, 10 C. B., p. 650; Innes vs. Stephenson, 1 Moo. & R., p. 145. This provision does not of course apply to partners, whose title is distinguished from joint ownership by Sec. 682.

1476. If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance. Effect of directions by creditors.

NOTE.—Thus, if the creditor directs money to be sent to him by mail, it is at his risk.—Graves vs. Amer. Exch. Bank, 17 N. Y., p. 207; Eyles vs. Ellis, 4 Bing., p. 112.

1477. A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary. Partial performance.

NOTE.—Smith vs. Brady, 17 N. Y., p. 187; Cunningham vs. Jones, 20 id., p. 486; Pullman vs. Corning, 9 id., p. 93.

1478. Performance of an obligation for the delivery of money only, is called payment. Payment, what.

NOTE.—Where money is delivered by one party to another and credited on account by him who received it, it will be considered a payment, unless it is shown to be intended as a loan. But such is not the case with (other) personal property, even though a value be affixed thereto.—Norton vs. Larco, 30 Cal., p. 126.

So far as extinguishing obligations for the delivery of money, payment and performance have the same meaning, so that under this section it may not be improper to note the leading California cases which involve, not the definition of the word "payment," but rather "what operates as a performance of the obligation to pay money," or in other words, "what constitutes a payment." And these cases have not always maintained the distinction made in this section that a *payment* is made by the delivery of *money* only, but *payment* and *performance* are often used in them as synonymous terms. In *Smith vs. Harper*, 5 Cal., p. 329, it was held that where a note was delivered to the maker, long before it became due, upon his giving the holder an order on the indorsers, which was dishonored, and thereupon it was returned to the holder, it did not operate as a payment. Giving a note does not extinguish the debt. It only has the effect to suspend the right of recovery until the maturity of the note. *Brewster vs. Bours*, 8 Cal., p. 501; *Smith vs. Owens*, 21 Cal., p. 11; *Higgins vs. Wortell*, 18 Cal., p. 330; *Welch vs. Allington*, 23 Cal., p. 322. Where a creditor received on account of his debt a bill of exchange drawn in his favor by the debtor upon a third person, it operates but as a conditional payment. If, however, the creditor fails to present it to the drawee for acceptance or payment, as required by the rules of commercial law, it becomes thereby an actual charge against him, and operates pro tanto as a satisfaction of his demand.—*Brown vs. Cronise*, 21 Cal., p. 386. Such undoubtedly would be the case with a bank check not presented for payment within a reasonable time.—See *Minturn vs. Fisher*, 4 Cal., p. 35; *McMillan vs. Richards*, 9 Cal., p. 365. In *Rhodes vs. Hinckley*, 6 Cal., p. 283, where the defendant being indebted to the plaintiff, a banking firm made a payment, on account, in the bank to one of the plaintiff's clerks, and on a subsequent day agreed to lend to the clerk the amount thus paid, who took the money and used it, and the amount thus paid was never credited to the defendant on the books of the plaintiff, it was held that the amount paid by the defendant, in the usual way of business, was a legal payment, and that the defendant lost all control over it. If the defendant is liable for the amount advanced (by plaintiff) to the clerk, it must be in an action for thus advancing it, and not in an action on the *original* indebtedness of the defendant. In *Griffith vs. Grogan*, 12 Cal., p. 314, a part payment by one of two joint debtors will not discharge such debtor

from the payment of the balance. His obligation is to pay the whole, not a proportionate share. An assignment of a joint and several negotiable promissory note by the payee to one of the makers before its maturity amounts to payment, and the right of action against the makers is not revived by a subsequent assignment to a third person *after* maturity. If the subsequent assignment, however, was made to an innocent person *before* maturity, a right of action would exist in his favor against the makers.—Gordon vs. Wansey, 21 Cal., p. 77. For other cases deciding what did and what did not constitute a payment, see Cook vs. Davis, 22 Cal., p. 157; Lodge vs. Turman, 24 Cal., p. 385; Griffith vs. Grogan, 12 Cal., p. 317; Colton vs. Seavey, 22 Cal., p. 496; Mount vs. Chapman, 9 Cal., p. 294; McCabe vs. Grey, 20 Cal., p. 509; Mulford vs. Estudillo, 23 Cal., p. 94; Guy vs. Du Uprey, 16 Cal., p. 195, and cases there cited. And for evidence of payment, see Smith vs. Harper, 5 Cal., p. 329, and compare with Banks vs. Marshall, 23 Cal., p. 223; see, also, Morrill vs. Morrill, 26 Cal., p. 288. See further, "Accord and Satisfaction," and "Set-Offs," or "Counter Claims."

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1479. Where a debtor, under several obligations to another, does an act, by way of performance, which is equally applicable to two or more of such obligations, such performance is applied as follows:

Applica-
tion of
general
perform-
ance.

1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, is manifested to the creditor, it is so applied;

2. If no such application is then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an applica-

tion once made by the creditor cannot be rescinded without the consent of the debtor;

3. If neither party makes such application within the time prescribed herein, the performance is applied to the extinction of obligations in the following order; and, if there is more than one obligation of a particular class, to the extinction of all in that class, ratably:

- (1.) Of an obligation due at the time of performance;
- (2.) Of an obligation not voidable at the option of the debtor;
- (3.) Of an obligation secured by a lien or collateral undertaking;
- (4.) Of interest;
- (5.) Of the obligation earliest in date of maturity;
- (6.) Of the obligation which it is most for the interest of the debtor to extinguish.

NOTE.—This subject is usually treated exclusively with reference to payments of money, which have indeed furnished all the cases upon which decisions have been reported. Obviously, however, the same principles are equally applicable to all classes of contracts, as, for example, where one has agreed, at various times, to deliver parcels of merchandise of the same species, such as wheat, flour, fruit, etc.

Subd. 1.—"If, at the time of performance."—*Allen vs. Culver*, 3 Den., p. 284; *Philpott vs. Jones*, 2 Ad. & El., p. 41; *Wendt vs. Ross*, 33 Cal., p. 360. "The intention or desire."—*Stone vs. Seymour*, 15 Wend., p. 19; *Waters vs. Tompkins*, 2 Cr. M. & R., p. 725; *Shaw vs. Picton*, 4 B. & C., p. 715. "Is manifested to the creditor."—In *Stone vs. Seymour* it was held that no express direction by the debtor was necessary. In *Van Rensselaer vs. Roberts*, 5 Den., p. 470, somewhat different language is used. On the whole, it seems reasonable to lay down the rule as in the text. The slightest act manifesting such desire is sufficient. See *Roberts vs. Garnie*, 3 Caines, p. 14.

Subd. 2.—"If no such application is then made, the creditor," etc.—*Allen vs. Culver*, 3 Den., p. 284; *Philpott vs. Jones*, 2 Ad. & El., p. 41; *Wendt vs. Ross*, 33 Cal., p. 650. "Within a reasonable time."—See *Bridenbecker vs. Lowell*, 32 Barb., pp. 9-22; *Allen*

vs. Culver, 3 Den., pp. 284-291. But in many cases it has been held that the creditor may exercise this right at *any* time.—*Mayor of Alexandria vs. Patten*, 4 Cranch, p. 317; *Haynes vs. Waite*, 14 Cal., p. 446; *Mills vs. Fowkes*, 5 Bing. N. C., p. 455; see *Philpott vs. Ellis*, 2 Ad. & El., p. 41. "Any obligation."—*Arnold vs. Mayor of Poole*, 4 Man. & Gr., p. 860; *Trotter vs. Grant*, 2 Wend., p. 413; *Clark vs. Burdett*, 2 Hall, p. 197; *Mills vs. Fowkes*, 5 Bing. N. C., p. 455; *Van Rensselaer vs. Roberts*, 5 Den., p. 470. "Performance of which was due."—*Niagara Bank vs. Roosevelt*, 9 Cow., p. 409; affirming *S. C., Hopk.*, p. 579; *Baker vs. Stackpoole*, 9 Cow., pp. 420-436. "In equal proportion to individual and trustee debts."—See *Bridenbecker vs. Lowell*, 32 Barb., p. 9; *Wendt vs. Ross*, 33 Cal., p. 650. "Consent of the debtor."—*Allen vs. Culver*, 3 Den., p. 284. When the creditor applies the payment to any particular debt, he cannot change such application without consent of the debtor.—*Wendt vs. Ross*, 33 Cal., p. 650.

Subd. 3. (1.) Of an obligation due at the time of performance.—*Thomas vs. Kelsey*, 30 Barb., p. 268; *Hunter vs. Osterhoudt*, 11 id., p. 33; *Baker vs. Stackpoole*, 9 Cow., p. 420; *Hall vs. Clement*, 41 N. H., p. 166. (2.) Of an obligation not voidable at option of debtor.—*Wright vs. Laing*, 8 B. & C., p. 165; *Crookshank vs. Rose*, 5 Carr. & P., p. 19. (3.) Of an obligation secured by a lien, etc.—*Pattison vs. Hull*, 9 Cow., p. 747; *Dows vs. Morewood*, 10 Barb., p. 183; *The Antarctic*, *Sprague*, p. 206; to the contrary is *Johnson's Appeal*, 37 Penn. St., p. 268. (4.) Of interest.—*People vs. New York Co.*, 5 Cow., p. 331; *Connecticut vs. Jackson*, 1 Johns. Ch., p. 13; *French vs. Kennedy*, 7 Barb., p. 452; *Williams vs. Houghtaling*, 3 Cow., p. 86. (5.) Of the obligation earliest in date of maturity.—*Dows vs. Morewood*, 10 Barb., p. 183; *Wheeler vs. Cropsey*, 5 How. Pr., p. 288; *Allen v. Culver*, 3 Den., p. 284; *Wendt vs. Ross*, 33 Cal., p. 650. (6.) Of the obligation which it is most for the interest of the debtor to extinguish.—As to this point there is much controversy. The rule here stated, subject to all the preceding qualifications, is that which appears to be supported by the weight of authority outside of this State.—See *Dows vs. Morewood*, 10 Barb., pp. 183-189; *Pattison vs. Hull*, 9 Cow., p. 747. A payment is to be applied so as to stop the running of interest as soon as possible.—*Jencks vs. Alexander*, 11 Paige, p. 619. In Pennsylvania the interest of the creditor is consulted by the Court.—*Johnson's Appeal*,

37 Penn. St., p. 268; *Pierce vs. Sweet*, 33 id., p. 151. Such, also, has been the rule in this State. In *Haynes vs. Waite*, 14 Cal., p. 447, and in *Smith vs. Owens*, April T., 1861, it was held that if the debtor at the time of, or previous to payment, neglects to designate to which of several debts he applies his payment, his right to control the application is gone, and the creditor may exercise it at any time before suit. The above section changes this rule.

In *Van Norden vs. Buckley*, 5 Cal., p. 283, it was held: Where the maker did not specify that the payment to the indorser was to meet the indorsed note, the indorser had a right to apply it to any indebtedness he held against the maker, and to stand upon his strict legal rights as to demand and notice in regard to the indorsed note. In *Phillips vs. Mayer*, 7 Cal., p. 81, the plaintiff employed an agent to collect a note due from the defendant, and the defendant employed the same agent to collect other notes due him (the defendant), and to apply the same on the plaintiff's note. The agent failed after having collected money on defendant's account. The Court held that unless the appropriation was actually made, the loss occasioned by the failure of the agent must fall on the defendant. In *Randall vs. Buffington*, 10 Cal., p. 491, it was held that there was no rule of law which prevented a debtor in insolvent circumstances from the application of his property to the payment of one debt rather than another. See, also, *Bishop vs. Hubbard*, 23 Cal., p. 518.

CHAPTER II.

OFFER OF PERFORMANCE.

SECTION 1485. Obligation extinguished by offer of performance.

1486. Offer of partial performance.

1487. By whom to be made.

1488. To whom to be made.

1489. Where offer may be made.

1490. When offer must be made.

1491. Same.

1492. Compensation after delay in performance.

1493. Offer to be made in good faith.

1494. Conditional offer.

1495. Ability and willingness essential.

1496. Production of thing to be delivered not necessary.

SECTION 1497. Thing offered to be kept separate.

1498. Performance of condition precedent.

1499. Written receipts.

1500. Extinction of pecuniary obligation.

1501. Objections to mode of offer.

1502. Title to thing offered.

1503. Custody of thing offered.

1504. Effect of offer on accessories of obligation.

1505. Creditor's retention of thing which he refuses to accept.

1485. An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.

Obligation
extin-
guished by
offer of per-
formance.

NOTE.—This section must be taken in connection with the succeeding sections of this Chapter. When thus taken, the law as laid down, is to the effect: 1. That a debt payable in specific articles may be discharged by a tender of those articles at the proper time and place; 2. That the articles must be set apart and designated, so as to enable the creditor to distinguish them from others; 3. The tender must be of all the articles, and not a tender of a portion only; 4. Tender must be made by the debtor, or with his assent; 5. The tender must be to the creditor, or in his absence, then as authorized by this Chapter; 6. The property so tendered vests in the creditor, and is at his risk. In the celebrated case of *Weld vs. Hadley*, 1 N. H., p. 295, it was held that a tender of specific articles might discharge the debt, and yet the creditor, if he refused the tender, acquired no property in such articles. But this decision has not been approved of, and probably is not now recognized as law in any State. Chancellor Kent (2 Comm., p. 509,) speaking of this case, says: "The case of *Weld vs. Hadley* was contrary to the doctrine declared in other cases; and the weight of argument, if not of authority, and the analogies of law, would appear to lead to the conclusion that on a valid tender of specific articles the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor." The adjudged cases probably settle the doctrine thus laid down.—*Rix vs. Strong*, 1 Root, p. 55; *Smith vs. Loomis*, 7 Conn., p. 110; *Curtis vs. Greenbanks*, 24 Verm., p. 536; *Tin vs. Rawley*, 4 Barr, p. 169; *Case vs. Green*, 5 Watts, p. 262; *Coit vs. Houston*, 3 John. C., p. 243; *Slingerland vs. Morse*, 8 John., p. 474; *Lamb vs. Lathrop*, 13 Wend., p. 95; 2

Greenlf. Ev., Sec. 610; Parsons on Contracts, pp. 637-655, and notes; see, also, California cases cited below.

In the case of *Des Arts vs. Leggett*, 16 N. Y., p. 582, Comstock, J., says: "The debtor who has contracted to deliver specific articles in payment of his debt, and who makes a valid tender, has done all in his power to perform his engagement. If the transaction is incomplete in consequence of the creditor's neglect or refusal to receive the articles, this is not the debtor's fault. As to him, there is a full performance, and he ought not to be burdened with the contract any longer. To say that he must *abandon* the articles in order to enable himself at all times to insist that he is freed from the obligation of the contract, is to expose not only the property to waste, but the debtor to consequences of needless severity if he happen to have made an insufficient tender, and to have judged erroneously on that point. In that event, he remains liable on his contract, while his property may become lost to him. If we say that he must not abandon the articles, but must keep them in readiness whenever called upon to deliver them upon the contract, then we merely assert in another form that the agreement is still in force against him, and that he remains indefinitely subject to its obligation, although he has once fully performed it if the tender was good. These results are avoided if we hold that, *on a valid tender being made, the title is changed, and the law applies the property in complete satisfaction of the debt.* Then the debtor may abandon if he elects so to do, and to incur the hazard. *If he does not so elect, but continues in possession, then he voluntarily assumes a new relation—that of bailee and trustee for the creditor, who has become the owner.* That relation henceforth becomes the rule and the measure of his responsibility. If the property is burned, or lost, or perishes on his hands, without his gross neglect, the loss will fall, where in justice it ought to fall, on the creditor, who is in fault. If he consumes it, or disposes of it to avoid the expense or inconvenience of its preservation, the contract does not thereby spring into a new existence, but he is responsible to the owner on the principles which govern the new relation he has assumed." The learned Justice then, speaking of controversies between the debtor and creditor concerning the sufficiency of the tender, says: "The controversy in all such cases is essentially this: the debtor alleges that the contract is performed, the debt satisfied, and the title to the things tendered changed to the creditor. The creditor denies the truth of these allegations. The

party against whom they (the allegations) are found is the legal owner. If found against the debtor, he must pay the debt in money, but he has not lost his goods; if found against the creditor, his debt is paid, but the property is his." See, also, *Billings vs. Vanderbeck*, 23 Barb., p. 546; *Slingerland vs. Morse*, 8 Johns., p. 474. This is undoubtedly the law in New York and most of the States with respect to all obligations other than for the payment of money. In this State the rule has not, perhaps, been so clearly settled, and this Chapter may have the effect to modify the law as contained in the decisions of our Supreme Court. See *Reddington vs. Chase*, 34 Cal., p. 666, and *Perre vs. Castro*, 14 Cal., p. 519, and compare these cases with *Hayes vs. Josephi*, 26 Cal., p. 535; *Lamott vs. Butler*, 18 Cal., p. 32; *Curia vs. Abadie*, 25 Cal., p. 502; and see, particularly, *Ketchum vs. Crippen*, 37 Cal., p. 223, where the effect of a tender is discussed, but not decided, and *Perry vs. Castro* (above cited) is commented on disapprovingly; see, also, *Gaven vs. Hagan*, 15 Cal., p. 208. But whether the rules as laid down in this and succeeding sections have or have not heretofore been the law in this State with respect to all obligations other than for the payment of money, they certainly have not been so, until now, in any State with respect to pecuniary obligations. The debtor has had heretofore no power to rid himself of the debt without the consent of the creditor. See *Dixon vs. Clarke*, 5 C. B., pp. 365-377; *Waistell vs. Atkinson*, 3 Bing., p. 290; *Kortright vs. Cady*, 23 Barb., p. 490; 21 N. Y., p. 343. And a tender has only operated to stop interest.—*Hidden vs. Jordan*, 39 Cal., p. 61, and California cases cited above. See further on this subject Sec. 1500, post, and note.

1486. An offer of partial performance is of no effect.

Offer of partial performance.

NOTE.—*Dixon vs. Clark*, 5 C. B., p. 365.

1487. An offer of performance must be made by the debtor, or by some person on his behalf and with his assent.

By whom to be made.

NOTE.—See *Mahler vs. Newbaur*, 32 Cal., p. 168; *Myers vs. South F. R. Water Co.*, 14 Cal., p. 268; *Osborne vs. Elliott*, 1 Cal., p. 337; *Barron vs. Frink*, 30 Cal., p. 486; *Muller vs. Eno*, 14 N. Y., p. 597; *Read vs. Goldring*, 2 M. & Selw., p. 86; see *Belshaw vs.*

Bush, 11 C. B., p. 191; Kemp vs. Balls, 10 Exch., p. 607; Simpson vs. Eggington, id., p. 845.

To whom to
be made.

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1488. An offer of performance must be made to the creditor, or to any one of two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made; and if not, then to a Notary Public.

NOTE.—Haldane vs. Johnson, 8 Exch., p. 689; Carman vs. Pultz, 21 N. Y., p. 547; Douglas vs. Patrick, 3 T. R., p. 683; Dawson vs. Ewing, 6 Serg. & R., p. 371; Kirton vs. Braithwaite, 1 M. & W., p. 310; Goodland vs. Blewith, 1 Camp., p. 477. The agent must have authority to receive payment in some shape.—Hargous vs. Lahens, 3 Sandf., p. 213; Bingham vs. Allport, 1 Nev. & M., p. 398; see Offley vs. Clay, 2 M. & G., p. 172; Kirton vs. Braithwaite, 1 M. & W., p. 310. Tender may be made to an agent instructed to collect by process of law (Crozer vs. Pilling, 4 B. & C., p. 26), even though forbidden to receive payment from the debtor.—Hatch vs. Hale, 15 Q. B., p. 10. “To a Notary Public.”—This provision is new. It is intended to provide a mode of offer, fair alike to the debtor and to the creditor. A creditor might be absent from the State when the debt became due, and have no agent here. If, under such circumstances, the debtor could stop the running of interest by a formal offer, addressed to no particular person, it is plain that great injustice might be done.

Where
offer may
be made

1489. In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor:

1. At any place appointed by the creditor; or,
2. Wherever the person to whom the offer ought to be made can be found; or,
3. If such person cannot, with reasonable diligence, be found within this State, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of

business, if the same can, with reasonable diligence, be found within the State; or,

4. If this cannot be done, then at any place within this State.

NOTE.—*Subd. 1.*—*Franchot vs. Leach*, 5 Cow., p. 506; *Robinson vs. Bachelder*, 4 N. H., p. 40; *Wyman vs. Winslow*, 2 Fairf., p. 398.

Subd. 2.—*Hunter vs. Le Conte*, 6 Cow., p. 728.

Subd. 3.—"Cannot with reasonable diligence be found within this State" (*Smith vs. Smith*, 2 Hill, p. 351; qualifying S. C., 25 Wend., p. 405.) "Within a reasonable distance from his residence," etc. This provision is perhaps new.—See *Smith vs. Smith*, 25 Wend., p. 405; 2 Hill, p. 351. "If he evades the debtor at his residence" (*Judd vs. Ensign*, 6 Barb., p. 258; see *Smith vs. Smith*,) "or place of business." Persons may do business in who reside out of this State, and this clause provides for that class.

1490. Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards.

When
offer must
be made.

NOTE.—"At that time within reasonable hours" (see *Dixon vs. Clark*, 5 C. B., pp. 365-378; *Startup vs. Macdonald*, 2 M. and G., p. 395), "and not before" (*Mitchell vs. Cook*, 29 Barb., p. 343). In Maryland, however, a tender before the day of all that would be due upon the day, interest included, is valid.—*McHard vs. Whetercroft*, 3 Harr. and McH., p. 85. "Nor afterwards."—*Livingston vs. Harrison*, 2 E. D. Smith, p. 197; *Poole vs. Tumbridge*, 2 M. and W., p. 223; *Hume vs. Peploe*, 8 East, p. 168; see *Kortright vs. Cady*, 21 N. Y., p. 343.

1491. Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform.

Same.

NOTE.—*Jones vs. Gibbons*, 8 Exch., p. 922.

1492. Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obliga-

Compensa-
tion after
delay in
perform-
ance.

tion, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime.

NOTE.—“Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation.” This clause obviates the difficulties which constantly arise in determining whether time is of the essence of a contract or not. The provision that “an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due,” is also new. But as such tender is permitted by statute after an action has been commenced, it clearly ought to be allowed before any litigation is had, to stop interest and avoid costs. Undoubtedly it is not allowed by the common law (*Poole vs. Tumbridge*, 2 M. and W., p. 223; *Hume vs. Peploe*, 8 East, p. 168), but the Judges acknowledged the hardship of the law on this point. In Connecticut, this rule has become law through usage.—*Tracy vs. Strong*, 2 Conn., p. 659.

Offer to be
made in
good faith.

1493. An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor.

NOTE.—Good faith is manifestly essential.

Conditional
offer.

1494. An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.

NOTE.—“Offer must be free from any conditions.” *Brooklyn Bank vs. Degrauw*, 23 Wend., p. 342; *Wood vs. Hitchcock*, 20 id., p. 47; *Eddy vs. O'Hara*, 14 id., p. 221. An offer conditioned upon a receipt in full (*Loring vs. Cook*, 3 Pick., p. 48; *Thayer vs. Brackett*, 12 Mass., p. 450; *Finch vs. Miller*, 5 C. B., p. 428), or a receipt of any kind (*Laing vs. Meader*, 1 Carr. & P., p. 257; *Griffith vs. Hodges*, id., p. 419; *Ryder vs. Townsend*, 7 Dowl. & Ryl., p. 119; see *Wood vs. Hitchcock*, 20 Wend., p. 47) being given; or upon the amount tendered being accepted in full of all or any demands (*Wood vs. Hitchcock*, 20 Wend., p. 47; *Strong vs. Harvey*, 3 Bing., p. 304) is bad at common law. It is proposed, however, to sanction a demand for a receipt.—

See Sec. 1499. "Which the creditor is not, on his part, bound to perform."—*Bevans vs. Rees*, 5 M. & W., p. 306. Thus, an offer of more than is due, conditioned upon the creditor taking out of it the amount which he claims to be due, is good (*Ib.*; *Dean vs. James*, 4 B. & Ad., p. 546; see *Hubbard vs. Chenango Bank*, 8 Cow., p. 100), if the creditor is not required to make change, for that he is not bound to do.—*Id.*; *Betterbee vs. Davis*, 3 Camp., p. 71. Where the creditor is bound by law to give a release upon payment, an offer conditioned upon his doing so is good.—*Saunders vs. Frost*, 5 Pick., pp. 260-270. So a party to a negotiable instrument may require its surrender upon payment (*Wilder vs. Seelye*, 8 Barb., p. 408), unless the holder has other claims upon it.—*Hargous vs. Lahens*, 3 Sandf., p. 213.

1495. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. Ability and willingness essential.

NOTE.—All the precedents assume this to be essential. Ability, however, and not readiness, is the true test. If a debtor knows that his creditor will not accept performance, he should not be required to prepare anything for delivery, at a useless cost of time and trouble.

1496. The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted. Production of thing to be delivered not necessary.

NOTE.—This is an innovation upon the common law, as far as obligations for the payment of money (*Bakeman vs. Pooler*, 15 Wend., p. 637; *Hornby vs. Cramer*, 12 How. Pr., p. 491; *Finch vs. Brook*, 1 Bing. N. C., p. 253), or for the delivery of a written instrument (see *Brooklyn Bank vs. Degrauw*, 23 Wend., p. 342), are concerned. But the former rule seems useless. In respect to bulky articles, this section is in conformity with the common law.—*Slingerland vs. Morse*, 8 Johns., p. 474; *Myers vs. Davis*, 26 Barb., p. 367; *Coit vs. Houston*, 3 Johns. Cas., p. 243.

1497. A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty. Thing offered to be kept separate.

NOTE.—*Hamilton vs. Ganyard*, 34 Barb., p. 204; *Betterbee vs. Davis*, 3 Camp., p. 71; *Bates vs. Churchill*,

32 Maine, p. 81; Leballister vs. Nash, 24 id., p. 316; Wyman vs. Winslow, 2 Fairf., p. 398; Veazy vs. Harmony, 7 Greenl., p. 91; Barney vs. Bliss, 1 D. Chipm., p. 399.

Performance of condition precedent.

1498. When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition.

NOTE.—Green vs. Wells & Co., 2 Cal., p. 584. See Sec. 1439, ante, and notes.

Written receipts.

1499. A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

NOTE.—This is a new provision. See Sec. 1494, and notes.

Extinction of pecuniary obligation.

1500. An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor.

NOTE.—This is contrary to the former law upon this subject, which made a tender operative only so far as to stop interest. The same rule has been applied to obligations for the delivery of deeds and other instruments (Brooklyn Bank vs. Degrauw, 23 Wend., p. 342), but this has been wisely overruled (Des Arts vs. Leggett, 16 N. Y., p. 582.) The provisions of this section have long been the law, in substance, in Louisiana and France. It would seem to be all that creditors can reasonably ask. The common law compels a debtor to keep the money which he owes, at his own risk. This is often an inconvenience, and sometimes a positive loss to him. See note to Sec. 1485.

Objections to mode of offer.

1501. All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated.

NOTE.—Carman vs. Pultz, 21 N. Y., p. 547; Kernochan vs. Bowery Ins. Co., 17 id., p. 428; Bumstead vs.

Dividend Mut. Ins. Co., 12 id., p. 81. Insuperable objections are not waived by silence.—Friess vs. Rider, 24 N. Y., p. 367; Mitchell vs. Cook, 29 Barb., p. 353.

1502. The title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.

Title to
thing
offered.

NOTE.—Des Arts vs. Leggett, 16 N. Y., p. 582; Lamb vs. Lathrop, 13 Wend., p. 95; Rix vs. Strong, 1 Root, p. 55; see Smith vs. Loomis, 7 Conn., p. 110. Heretofore this rule did not apply to money, but that was because a tender did not extinguish a pecuniary debt. Section 1500 removes the ground of this distinction. See Lamott vs. Butler, 18 Cal., p. 32, where B sells and delivers to C certain personal property, with an agreement then made that C is to resell and redeliver, upon B's executing and delivering to C certain notes, and B subsequently tenders these notes and demands the property, and C refuses to take the notes or surrender the property, and the whole transaction on the part of C was a fraud, his intention being to get hold of and keep the property (see the facts of the case, 18 Cal., p. 35, and as stated in Butler vs. Collins, 12 Cal. p. 457; Collins vs. Butler, 14 Cal., p. 223); Held: that the tender of the notes did not vest the ownership thereof in C, and that he cannot sue on them; that the fraud takes the case out of the rule that a tender of specific personal property vests the title thereto in the teree. See, also, note to Sec. 1485.

1503. The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire, until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and, if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person.

Custody of
thing
offered.

NOTE.—Sheldon vs. Skinner, 4 Wend., p. 525. These rules seem reasonable, though they are not established (nor denied) by adjudged cases.

1504. An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of inter-

Effect of
offer on
accessories
of
obligation.

est on the obligation, and has the same effect upon all its incidents as a performance thereof.

NOTE.—Kortright vs. Cady, 21 N. Y., p. 343; Law vs. Jackson, 9 Cow., p. 641; Raymond vs. Bearnard, 12 Johns., p. 274; Chilton vs. Carrington, 15 C. B., pp. 95, 730. See note to Secs. 1485, 1500.

Creditor's retention of thing which he refuses to accept.

1505. If anything is given to a creditor by way of performance, which he refuses to accept as such, he is not bound to return it without demand; but if he retains it, he is a gratuitous depositary thereof.

NOTE.—Kingston Bank vs. Gay, 19 Barb., p. 460; Gordon vs. Strange, 1 Exch., p. 477.

CHAPTER III.

PREVENTION OF PERFORMANCE OR OFFER.

SECTION 1511. What excuses performance, etc.

1512. Effect of prevention of performance.

1513. Same.

1514. Same.

1515. Effect of refusal to accept performance before offer.

What excuses performance, etc.

1511. The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this State or of the United States, unless the parties have expressly agreed to the contrary; or,

3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which

such performance or offer may be made, and not rescinded before that time.

NOTE.—*Subd. 1.*—Where performance is simply *delayed*, and not made forever impossible, delay only is excused (*Williams vs. Vanderbilt*, 29 Barb., p. 491; *Schilizzi vs. Derry*, 4 El. & Bl., p. 873; *White vs. Mann*, 26 Maine, p. 368), unless the delay is for an indefinite or unreasonable period, as in case of a blockade, which puts an end to an obligation to enter the harbor. *Scott vs. Libby*, 2 Johns., p. 336; *The Tutela*, 6 Rob. Adm., p. 177; see the *Isabella Jacobina*, 4 Rob. Adm., p. 77. “Prevented or delayed by act of creditor.”—See *Masterton vs. Mayor, etc.*, of Brooklyn, 7 Hill, p. 61; *McConihe, vs. N. Y. & Erie R. R. Co.*, 20 N. Y., p. 495; *Ellen vs. Topp*, 6 Exch., pp. 424–440. “Prevented or delayed by the operation of law.”—See *Jones vs. Judd*, 4 N. Y., p. 411; *People vs. Bartlett*, 3 Hill, p. 570; *Esposito vs. Bowden*, 4 El. & Bl., p. 963.

Subd. 2.—The rule laid down in *Tompkins vs. Dudley*, 25 N. Y., p. 272, and *Harmony vs. Bingham*, 12 id., p. 99, is that not even the act of God excuses the non-performance of a *contract*, though it relieves from an obligation created merely by operation of law. But this doctrine was not absolutely necessary to the decision of those cases, nor to that of those there cited; such a principle cannot be reconciled with the decision in *Wolfe vs. Howes*, 20 N. Y., p. 197. The clause here inserted is consistent with all that was actually decided in these cases, and is certainly no more than just. There can be no doubt that parties to contracts do not contemplate such a strict liability; the only doubt is whether they do not assume the existence of even a much more liberal rule.—See *Williams vs. Lloyd, W. Jones*, p. 179; *Taylor vs. Caldwell*, 3 Best & S., p. 826.

Subd. 3.—It is not necessary that the debtor should be literally *prevented* by the creditor from performing. If he is induced by the creditor, in any way, to abstain from or to delay performance, that is sufficient excuse. See *Young vs. Hunter*, 6 N. Y., p. 203; *Carman vs. Pultz*, 21 id., p. 547; *Fleming vs. Gilbert*, 3 Johns., p. 531; *Farnham vs. Ross*, 2 Hall, p. 167; *Higgins vs. Solomon*, id., p. 482; *Southworth vs. Smith*, 7 Cush., p. 391; *Gilmore vs. Holt*, 4 Pick., p. 258. Not only a positive request of the creditor (*Carman vs. Pultz*, 21 N. Y., p. 547), but any act on his part which would make performance or an offer thereof useless (*Cornwell vs. Haight*, 21 N. Y., p. 462), excuses the want of performance. “Done at or before the time at which

the offer may be made."—*Skinner vs. Tinker*, 34 Barb., p. 333; *Crist vs. Armour*, id., p. 378.

Effect of
prevention
of perform-
ance:

Am

1512. If the performance of an obligation is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained by its performance on both sides.

NOTE.—*Masterton vs. Mayor of Brooklyn*, 7 Hill, p. 61; see *Clarke vs. Mayor*, etc., of New York, 4 N. Y., p. 338.

Rh

Same.

1513. If a debtor is dissuaded by his creditor from performance, but is not actually forbidden to perform, he may, at his option, omit to perform, and retain whatever he has received under the contract, but he is entitled to nothing more.

Same.

1514. If performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

NOTE.—In *Clark vs. Gilbert*, 26 N. Y., p. 279, reversing S. C., 32 Barb., p. 576, it was held that the contract price should furnish the measure of damages in such case, and that the party performing was not confined to a mere reasonable compensation. Where full performance is prevented by the interposition of law, or of a superhuman cause, the party required to perform cannot recover the entire compensation to which he would have been entitled upon full performance, even though he is entirely without fault.—*Melville vs. De Wolf*, 4 El. & Bl., p. 843. But he is entitled to a compensation according to the proportion of time or labor expended by him, subject to the rule of the text.—*Wolfe vs. Howes*, 20 N. Y., p. 197. Thus, if an author should die, leaving any quantity of undigested manuscript, prepared under a contract with a publisher, nothing could be recovered by his representatives.—Id.

1515. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.

Effect of refusal to accept performance before offer

NOTE.—*Meserole vs. Archer*, 3 Bosw., pp. 376-382; *North vs. Pepper*, 21 Wend., p. 638; *Traver vs. Halstead*, 23 Wend., p. 66.

CHAPTER IV.

ACCORD AND SATISFACTION.

SECTION 1521. Accord, what.

1522. Effect of accord.

1523. Satisfaction, what.

1524. Accord of liquidated debt.

1521. An accord is an agreement to accept, in extinction of an obligation, something to which the person agreeing to accept is not otherwise entitled.

Accord, what.

NOTE.—*Williams vs. London Com. Exch. Co.*, 10 Exch., p. 569; *Scott vs. Hunt*, 2 How. Pr., p. 58; *Seymour vs. Minturn*, 17 Johns., p. 169; *Keeler vs. Neal*, 2 Watts, p. 424.

1522. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

Effect of accord.

NOTE.—See *Billings vs. Vanderbeck*, 23 Barb., p. 546; *Gabriel vs. Dresser*, 15 C. B., p. 622; *Day vs. Roth*, 18 N. Y., p. 456; *Russell vs. Lytle*, 6 Wend., p. 390; *Tilton vs. Alcott*, 16 Barb., p. 598; *Mitchell vs. Hawley*, 4 Denio, p. 417.

1523. Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction.

Satisfaction, what.

NOTE.—*Hall vs. Flockton*, 16 Q. B., p. 1039; *Jones vs. Sawkins*, 5 C. B., p. 142. Though an accord and

satisfaction is not at common law a defense to a claim founded upon a record or specialty (*Mitchell vs. Hawley*, 4 Den., p. 414), this section does not recognize such a distinction.

Ann

Accord of
liquidated
debt.

1524. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, extinguishes the obligation.

NOTE.—Before the passage of the Act of 1868 (see Stats. 1868, p. 31), the rule of law was that payment of an amount less than that of a liquidated debt then payable was not a satisfaction thereof, though accepted as such.—*Deland vs. Heitt*, 27 Cal., p. 611; *Pierson vs. McCahill*, 21 Cal., p. 122; but see, also, *Gavan vs. Annan, L. and Co.*, 2 Cal., p. 494. Such, also, is yet the settled law in many of the States.—*Palmerston vs. Huxford*, 4 Denio, p. 166; *Neary vs. Bostwick*, 2 Hilt., p. 514; see *Evans vs. Powis*, 1 Exch., p. 601; *Wilkinson vs. Byers*, 1 Ad. and El., p. 106; *Brooks vs. White*, 3 Metc., p. 286; *Goodnow vs. Smith*, 18 Pick., p. 414; *Smith vs. Brown*, 3 Hawks, p. 580; *Von Gerhard vs. Lighte*, 13 Abb. Pr., p. 101; *Harrison vs. Wilcox*, 2 Johns., p. 448; *Dederick vs. Leman*, 9 id., p. 333; *Scott vs. Hunt*, 2 How. Pr., p. 58; *Down vs. Hatcher*, 10 Ad. and El., p. 121; *Thomas vs. Heathorn*, 2 B. and C., p. 477; *Fitch vs. Sutton*, 5 East., p. 230; *Cumber vs. Wane*, 1 Str., p. 426. This rule of the common law was not founded upon natural justice, nor can it be supported upon any other than technical grounds. An agreement to accept a barrel of flour in satisfaction of a debt of one thousand dollars was valid, and if the flour was delivered the debt was satisfied. So a release under seal, without any consideration, extinguished the debt. But an agreement to accept nine hundred and ninety-nine dollars in satisfaction of the debt was unavailing, and the obligation to pay the other dollar was unimpaired. In Pennsylvania, the rule has been disavowed for over thirty years past. (*Milliken vs. Brown*, 1 Rawle, p. 391.) It has been abolished in Maine by statute. (Laws 1851, Ch. 213. The section given above is substantially the law of 1867-8.

CHAPTER V.

NOVATION.

SECTION 1530. Novation, what.

1531. Modes of novation.

1532. Novation a contract.

1533. Rescission of novation.

1530. Novation is the substitution of a new obligation for an existing one. Novation,
what.

1531. Novation is made:

1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; Modes of
novation.

2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,

3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

NOTE.—*Subd. 2.*—*Conkling vs. King*, 10 N. Y., p. 440; *Graves vs. Friend*, 5 Sandf., p. 568; *St. John vs. Purdy*, 1 id., p. 9; *N. Y. State Bank vs. Fletcher*, 5 Wend., p. 85; *Sard vs. Rhodes*, 1 M. & W., p. 153. But if there is no agreement to accept the new obligation in satisfaction, it is not a satisfaction.—*Noel vs. Murray*, 13 N. Y., p. 167; *Vail vs. Foster*, 4 id., p. 312; *Monroe vs. Hoff*, 5 Den., p. 360. The intent is the material question.—*Jobbitt vs. Goundry*, 29 Barb., p. 509; *Barringer vs. Warden*, 12 Cal., p. 311. A purchased land of B, and as a part of the consideration agreed to pay certain debts of B owing to C. C assigned these debts to D. Neither C nor D were parties to the agreement between A and B, nor did they assent to it. It was held that D could not maintain an action against A, there being no privity between the parties, no novation of the indebtedness, and no assent to the transaction, which might make the agreement an equitable assignment.—*McLaren vs. Hutchinson*, 18 Cal., p. 80. But this decision was commented on and questioned in *Lewis vs. Covillaud*, 21 Cal., p. 178; and see, also, in same connection, *McLaren vs. Hutchinson*, 22 Cal., p. 187; *Wiggins vs. McDonald*, 18 Cal., p. 126; *Gyle vs. Shoenbar*, 23 Cal., p. 538.

Novation a
contract,

1532. Novation is made by contract, and is subject to all the rules concerning contracts in general.

Rescission
of novation

1533. When the obligation of a third person, or an order upon such person, is accepted in satisfaction, the creditor may rescind such acceptance if the debtor prevents such person from complying with the order, or from fulfilling the obligation; or if, before the creditor can with reasonable diligence reach such person, he becomes insolvent.

NOTE.—“If the debtor prevents such person from complying with the order.”—See *Franklin vs. Vanderpool*, 1 Hall, p. 78; *Coyle vs. Smith*, 1 E. D. Smith, p. 400; *Purchase vs. Mattison*, 6 Duer, p. 587; *Jacks vs. Darrin*, 3 E. D. Smith, p. 557. “If, before the creditor can with reasonable diligence reach such person, he becomes insolvent.”—See *Lovett vs. Cornwall*, 6 Wend., p. 369, affirming S. C.; 1 Hall, p. 56; *Timmins vs. Gibbins*, 18 Q. B., p. 722; *Ontario Bank vs. Lightbody*, 13 Wend., p. 107; see *Heubach vs. Mollman*, 2 Duer, p. 227; *Benedict vs. Field*, 16 N. Y., p. 595; but see *Des Arts vs. Leggett*, id., pp. 582, 589.

CHAPTER VI.

RELEASE.

SECTION 1541. Obligation extinguished by release.

1542. Certain claims not affected by general release.

1543. Release of several joint debtors.

Obligation
extin-
guished by
release.

1541. An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.

NOTE.—See notes to Sec. 1524.

Certain
claims not
affected by
general
release.

1542. A general release does not extend to claims which the creditor did not know or suspect to exist in his favor at the time of executing the release.

NOTE.—*Lyall vs. Edwards*, 6 H. & N., p. 337.

1543. A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him.

Release of
several
joint
debtors.

NOTE.—This provision is new (see *Cornell vs. Masten*, 35 Barb., p. 157; *Bronson vs. Fitzhugh*, 1 Hill, p. 185; *Hoffman vs. Dunlop*, 1 Barb., p. 185; *Parsons vs. Hughes*, 9 Paige, p. 591; *Catskill Bank vs. Messenger*, 9 Cow., p. 37; *Rowley vs. Stoddard*, 7 Johns., p. 207. A release *may* be so drawn as to discharge one only of several joint debtors. As the intention of the creditor is evident enough from the form of the release, the justice of this provision can hardly be disputed.

PART II.

CONTRACTS.

- TITLE I. NATURE OF A CONTRACT.
II. MANNER OF CREATING CONTRACTS.
III. INTERPRETATION OF CONTRACTS.
IV. UNLAWFUL CONTRACTS.
V. EXTINCTION OF CONTRACTS.
-
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TITLE I.

NATURE OF A CONTRACT.

- CHAPTER I. *Definition.*
II. *Parties.*
III. *Consent.*
IV. *Object.*
V. *Consideration.*
-

CHAPTER I.

DEFINITION.

- SECTION 1549. Contract, what.
1550. Essential elements of contract.

1549. A contract is an agreement to do or not to do a certain thing. Contract.
what.

NOTE.—McNulty vs. Prentice, 25 Barb., p. 204;
Sturges vs. Crowninshield, 4 Wheat., p. 197. A judg-

ment is a contract.—*Stuart vs. Lander*, 16 Cal., p. 372; *Wallace vs. Eldredge* (No. 2), 32 Cal., p. 610; *Scarborough vs. Dugan*, 10 Cal., p. 305. What constitutes a contract.—*Hoen vs. Simmons*, 1 Cal., p. 119; *Craig vs. Godfrey*, 1 Cal., p. 415; *Godefroy vs. Caldwell*, 2 Cal., p. 489; *Keller vs. Ybarru*, 3 Cal., p. 147; *San Francisco vs. Beideman*, 17 Cal., p. 443; *Burr vs. Schroeder*, 32 Cal., p. 610; *Masten vs. Griffing*, 33 Cal., p. 111.

Essential
elements of
contract.

1550. It is essential to the existence of a contract that there should be :

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. A sufficient cause or consideration.

CHAPTER II.

PARTIES.

SECTION 1556. Who may contract.

1557. Minors, etc.

1558. Identification of parties necessary.

1559. When contract for benefit of third person may be enforced.

Who may
contract.

1556. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

Minors,
etc.

1557. Minors and persons of unsound mind, have only such capacity as is defined by Part I of Division I of this Code.

NOTE.—Agreement between father and children.—*Racouillat vs. Sansevain*, 32 Cal., p. 376. Between stepmother and stepchildren.—*Murdock vs. Murdock*, 7 Cal., p. 511.

Identifica-
tion of
parties
necessary.

1558. It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them.

NOTE.—*Webster vs. Ela*, 5 N. H., p. 540.

1559. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

When contract for benefit of third person may be enforced.

NOTE.—See *Burr vs. Beers*, 24 N. Y., p. 178; *Lawrence vs. Fox*, 20 id., p. 268; *Scott vs. Pilkington*, 15 Abb., p. 280; *Steman vs. Harrison*, 42 Penn. St., p. 49. The rule stated in these cases was limited to promises in which the purpose was expressed, in *Hoffman vs. Schwaebe*, 33 Barb., p. 194. In *McLaren vs. Hutchinson*, 18 Cal., p. 80, it was held that where A owes B and B owes C, and A and B, without consulting C, agree that A shall pay to C the amount which A owes to B, an action could not be maintained by C against A, for want of privity; but this decision was questioned in *Lewis vs. Covillaud*, 21 Cal., p. 178; see, also, *McLaren vs. Hutchinson*, 22 Cal., p. 187; see, also, *Barringer vs. Warden*, 12 Cal., p. 311.

CHAPTER III.

CONSENT.

SECTION 1565. Essentials of consent.

- 1566. Consent, when voidable.
- 1567. Apparent consent, when not free.
- 1568. When deemed to have been obtained by fraud, etc.
- 1569. Duress, what.
- 1570. Menace, what.
- 1571. Fraud, actual or constructive.
- 1572. Actual fraud, what.
- 1573. Constructive fraud.
- 1574. Actual fraud a question of fact.
- 1575. Undue influence, what.
- 1576. Mistake, what.
- 1577. Mistake of fact.
- 1578. Mistake of law.
- 1579. Mistake of foreign laws.
- 1580. Mutuality of consent.
- 1581. Communication of consent.
- 1582. Mode of communicating acceptance of proposal.
- 1583. When communication deemed complete.
- 1584. Acceptance by performance of conditions.
- 1585. Acceptance must be absolute.

SECTION 1586. Revocation of proposal.

1587. Revocation, how made.

1588. Ratification of contract, void for want of consent.

1589. Assumption of obligation by acceptance of benefits.

Essentials
of consent.

1565. The consent of the parties to a contract must be :

1. Free;
2. Mutual; and,
3. Communicated by each to the other.

NOTE.—*Subd. 2.*—Getman vs. Getman, 1 Barb. Ch., p. 499; Burnet vs. Bisco, 4 Johns., p. 235. See Young vs. Starkey, 1 Cal., p. 426, and Masten vs. Griffing, 33 Cal., p. 111.

Subd. 3.—Communication of consent is indispensable.—Bentley vs. Columbian Ins. Co., 17 N. Y., p. 421; Heubach vs. Mollman, 2 Duer, pp. 256, 257; Fiedler vs. Tucker, 13 How. Pr., p. 9; Mozley vs. Tinkler, 1 Cr. M. & R., p. 692; Keller vs. Ybarra, 8 Cal., p. 147; Masten vs. Griffing, 33 Cal., p. 111. But it need not be verbally expressed.—See Mathewson vs. Fitch, 22 Cal., p. 86. An understanding between the parties is sufficient.—Houghton vs. Adams, 18 Barb., p. 545; Gluckauf vs. Urton, 19 Cal., p. 61. For consent generally, see Parsons on Contracts, Title Assent, pp. 475-480, and notes.

Consent,
when
voidable.

1566. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the Chapter on Rescission.

NOTE.—Murray vs. Mann, 2 Exch., p. 538; Gage vs. Parker, 25 Barb., p. 141; Deputy vs. Stapleford, 19 Cal., p. 302.

Apparent
consent,
when not
free.

1567. An apparent consent is not real or free when obtained through :

1. Duress;
2. Menace;
3. Fraud;
4. Undue influence; or,
5. Mistake.

NOTE.—Menace has usually been classed with duress, and will be found to be treated under that head in

the digests. It is, however, clearly a separate branch of the subject. Accident and surprise are included under the head of mistake.

1568. Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed.

When deemed to have been obtained by fraud, etc.

NOTE.—*Bronson vs. Wiman*, 8 N. Y., pp. 188, 189; *Flight vs. Booth*, 1 Bing. N. C., p. 376; *Code La.*, § 1819; *Faure vs. Martin*, 7 N. Y., p. 219. It is not essential that the fraud, etc., should be the sole inducement to consent.—*Shaw vs. Stine*, 8 Bosw., p. 157; *Addington vs. Allen*, 11 Wend., p. 381; *Clarke vs. Dickson*, 6 C. B. (N. S.), p. 453.

1569. Duress consists in :

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
2. Unlawful detention of the property of any such person; or,
3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing or oppressive.

Duress, what.

NOTE.—*Subd. 1.*—"Confinement of the person of the party."—*Foshay vs. Ferguson*, 5 Hill, p. 154; *Bac. Abr.*, *Duress*, A. If the confinement is lawful there is no duress.—*Bates vs. Butler*, 46 Me., p. 387. "Descendant."—*Code La.*, § 1847; *Code Napoleon*, § 1113; *Bac. Abr.*, *Duress*, B; see *McClintock vs. Cummings*, 3 McLean, p. 158; *Eadie vs. Slimmons*, 26 N. Y., p. 9. "Adopted child." New provision, but in accordance with the Title on Adoption.

Subd. 2.—The rule laid down in this subdivision has been denied.—*Skeats vs. Beale*, 11 Ad & El., p. 983; *Atlee vs. Backhouse*, 3 M. & W., p. 650. But it was originally so held in Privy Council (*Assize*, 5 Year Book, fol. 72, pl. 14), and it has been so decided in this country (*Collins vs. Westbury*, 2 Bay, p. 211; *Sasportas vs. Jennings*, 1 Bay, p. 470; see, also, *Nelson vs. Suddarth*, 1 Hen. & Munf., p. 350), with the approval of *Bronson, J.*—*Foshay vs. Ferguson*, 5 Hill, p. 158.

It is universally held that *money paid* under such duress may be recovered back (*Harmony vs. Bingham*, 12 N. Y., p. 99; *Oates vs. Hudson*, 6 Exch., p. 346; *Atlee vs. Backhouse*, 3 M. & W., p. 642); and it is very difficult to see why, under precisely similar circumstances, a note given instead of money should be enforced.

Subd. 3.—*Strong vs. Grannis*, 26 Barb., p. 122; *Watkins vs. Baird*, 6 Mass., p. 511; *Richardson vs. Duncan*, 3 N. H., p. 508; *Severance vs. Kimball*, 8 N. H., p. 386; *Richardson vs. Duncan*, 3 id., p. 508.

Menace,
what.

1570. Menace consists in a threat:

1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
3. Of injury to the character of any such person.

NOTE.—*Subd. 1.*—*Eadie vs. Slimmon*, 26 N. Y., p. 9; *Whitefield vs. Longfellow*, 13 Maine, p. 146; compare *Biffin vs. Bignell*, 7 H. & N., p. 877.

Subd. 2.—*Co. Inst.*, p. 483; See *Foshay vs. Ferguson*, 5 Hill, p. 158; see contra, *Bac. Abr., Duress, A.* See note below.

Subd. 3.—This species of threat is not usually included in the definition of duress, and was doubtless not so treated under the old common law, when a libeler could be made to rot in jail until he paid damages, while neither the judgment creditor nor any one else was bound to find him food or drink (*Dive vs. Maningham*, 1 Plowd., p. 68); and when some debtors did actually starve to death. With such a savage remedy for the recovery of pecuniary damages, they might be considered an adequate satisfaction for injuries to property or character, and it was on this ground that such injuries were not regarded as duress.—*Bac. Abr., Duress, A.* The remedy now existing is less effective, even if money were considered equivalent to character. By statute, it is now a criminal offense to send threatening letters for the purpose of extorting money, and that which is thus treated as a crime ought not to be allowed to sustain a contract. These views are further sustained by *Story Cont., Sec. 398*; *2 Stark Ev.*, p. 482; *Chitt. Cont.*, p. 218. And see *Eadie vs. Slimmon*, 26 N. Y., p. 9, in which some weight is given to the

influence of a threat involving the loss of a husband's character.

1571. Fraud is either actual or constructive.

NOTE.—Conkey vs. Bond, 34 Barb., p. 286.

Fraud,
actual or
constructive.

1572. Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

Actual
fraud, what

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.

NOTE.—“Within the meaning of this Chapter.” This definition is not to be considered as covering all varieties of fraud, but only such fraud as vitiates the consent of a party to a contract. “Consists in any of the following acts.”—Story (Eq. Jur., § 187), defines fraud as a “trick, device, or artifice,” etc. In *Gardner vs. Hearitt*, 3 Denio, p. 236, it is called “a deceitful practice, or willful device.” It is at least doubtful whether any peculiar “artifice” is necessary to constitute fraud. In *Nichols vs. Pinner*, 18 N. Y., p. 295, and *Nichols vs. Michael*, 23 N. Y., p. 264, Selden, J., expressed his opinion that there must be something of the kind, in addition to an *intent* to defraud, in order to constitute fraud in a purchase. But in each of those cases a different opinion was expressed by other Judges, and in *Hennequin vs. Naylor*, 24 N. Y., p. 139, the opinion of James, J., which appears to have been concurred in by the whole Court, is explicit to the contrary. So is *King vs. Phillips*, 8 Bosw., p. 603. This section inclines to the latter view as more sound.—See, also, *Brown vs. Montgomery*, 20 N. Y., p. 287. “Or with his connivance.”—A fraudulent representation made by C to A, with intent to induce A to

enter into a contract with B, would not, it is clear, enable A to rescind the contract if B had no part in or knowledge of the fraud (*Holbrook vs. Wilson*, 4 Bosw., p. 64), at least, on the ground of *fraud*. But if C was the agent of B, or even if he acted in concert with him, or in short, if B in any way connived at the fraud, A might rescind.—See *Cassard vs. Hinman*, 6 Bosw., p. 8.) “With intent to deceive.” For the purpose of avoiding a contract, it is not necessary that the fraud should have been committed with an intent to *injure* the party deceived. Every man has a right to decide for himself whether he will enter into a contract or not, and no one has a right to deceive him even for his own good. The cases in which the question of injury is discussed are direct actions for deceit, in which, of course, if no damage has been suffered, none can be recovered. Naked misrepresentation, however wrong in point of morals, unaccompanied by actual damage, does not afford ground for relief against an executed contract for the sale of land.—*Board of Commissioners F. D. S. J. vs. Younger*, 29 Cal., p. 172. But a fraudulent intent is nevertheless essential to constitute actual fraud. Even an untrue statement is not *necessarily* a fraud, for it may be made and accepted in jest. Much more is some fraudulent intent necessary to be shown in cases of mere concealment. For fraudulent intent, see *Swartz vs. Hazlett*, 8 Cal., p. 118. The declarations and acts of a vendor before sale are competent testimony to show a fraudulent intent on his part. *Landecker vs. Houghtaling*, 7 Cal. p. 391; *Visher vs. Webster*, 8 Cal., p. 109; *Cohen vs. Mulford*, 15 Cal., p. 50. An intent to deceive, whenever carried out, constitutes a fraud, even though there may not have been an intent to induce the party deceived to contract. Thus, if A should, on Monday, out of mere mischief or love of deception, tell B that Congress had just repealed the duty on paper, and should sustain his assertion by showing public news to the same effect, which he however knows to be erroneous, and should, on Tue-day, purchase paper of B on terms to which B was induced to assent by reason of the falsehood of the day before, B would clearly have a right to rescind, even though A did not know or suppose that B was influenced by his false statements. The assertion of a certain thing as a matter of fact, when in reality the asserter knows nothing about the matter, may often be a fraud, without any clear intention to deceive. In such cases, it is more satisfactory to fix upon the intent to induce consent as the test of fraud. Even where

there is no intent to deceive, there may be such an amount of gross carelessness as to constitute conclusive evidence of fraudulent intent.—*Alvarez vs. Brannan*, 7 Cal., p. 503.

Subd. 1.—The word "suggestion" is used, instead of "assertion," because even a hint, or a true report of what others have untruly said, is a fraud, when conveying an impression which the party knows to be false, and made for that purpose.—See *Haight vs. Hayt*, 19 N. Y., p. 464; *White vs. Merritt*, 7 id., p. 352; *Gifford vs. Carvill*, 29 Cal., p. 589; also, see *De Leon vs. Higuera*, 15 Cal., p. 483; also, *Rhea vs. Surryhne*, 39 Cal., p. 579. As to what constitutes actual fraud, see the able opinion of Justice Wallace in *Roseman & Howland vs. Canovan & Sanborn*, January Term Sup. Ct. Cal., 1872. A misrepresentation of the value of a business and the good will thereof, knowingly made by the vendor, *held*: fraudulent, and entitled purchaser to rescission of the contract.—*Cruess vs. Fessler*, 39 Cal., p. 336.

Subd. 2.—*Bennett vs. Judson*, 21 N. Y., p. 238; *Craig vs. Ward*, 36 Barb., p. 377; *Evans vs. Edmonds*, 13 C. B., p. 776.

Subd. 3.—*Belden vs. Henriques*, 8 Cal., p. 87; *Nichols vs. Michael*, 23 N. Y., p. 264; *Hennequin vs. Naylor*, 24 N. Y., p. 139; *Hall vs. Naylor*, 18 id., p. 588; *Addington vs. Allen*, 7 Wend., p. 20; *Lee vs. Jones*, 14 C. B. (N. S.), p. 386; *Bank of Republic vs. Baxter*, 31 Verm., p. 101; *Paddock vs. Strobbridge*, 29 id., p. 470; *Martin vs. Morgan*, 1 Brod. & B., p. 289; *Drummond vs. Tracy*, 6 Jar. (N. S.), p. 369; see *Squire vs. Whitten*, 1 H. of L. Cas., p. 333; *Dolman vs. Nokes*, 22 Beav., p. 402; *Broderick vs. Broderick*, 1 P. Wms., p. 239. Concealment of the fact by a vendor of real property that he holds merely as tenant, does not constitute such fraud as will entitle his vendee to relief in equity.—*Hastings vs. O'Donnell*, 40 Cal., p. 148.

Subd. 4.—It has been held that a mere *promise*, though made with an intention not to perform it, and for the purpose of misleading a party to his injury, is not such a fraud as would sustain an action for deceit. *Farrington vs. Bullard*, 40 Barb., p. 512; *Gallagher vs. Brunel*, 6 Cow., p. 346; *Fisher vs. New York C. P.*, 18 Wend., p. 608. It is not such a fraud as will sustain an indictment for false pretenses (*Ranney vs. People*, 22 N. Y., p. 413); but it seems to stand upon the same footing with a purchase of goods with intent not to pay, which has been repeatedly held to be a fraud.—*Hennequin vs. Naylor*, 24 N. Y., p. 139; *Nichols vs. Michael*,

28 id., p. 264; King vs. Phillips, 8 Bosw., p. 603; see especially Bigelow vs. Heaton, 6 Hill, p. 43. In Seaman vs. Low, 4 Bosw., p. 337, false representations as to what the seller was *about* to do, were held sufficient to avoid a sale. See, also, Butler vs. Collins, 12 Cal., p. 457.

Subd. 5.—In Farley vs. Vaughn et al., 11 Cal., p. 227, it was held that it would be a fraud, which no Court of equity would tolerate, to hold that the vendor of land on a contract to convey, receiving a portion of the purchase money, and seeing the vendee expend large sums of money improving the property, without objection, and not making any demand for the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid, and all the improvements, and deny all obligations on his part to comply with his engagements. In such a case, where there has been a compliance with a reasonable understanding of the contract, and no injury done by the want of an exact compliance, a specific performance will be decreed. A deed obtained through fraud is only voidable, and a bona fide purchaser from the vendee in such deed, for a valuable consideration, without notice of the fraud, will hold the property.—Deputy vs. Stapleton, 19 Cal., p. 302. Where one of two innocent persons must suffer loss by the fraudulent act of a third, he who enabled such third party to occasion the loss, must bear it. Poorman vs. Mills & Co., 39 Cal., p. 345.

Constructive fraud.

1573. Constructive fraud consists :

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

NOTE.—Subd. 1.—Bulkley vs. Wilford, 2 Clark & Fin., pp. 102, 177, 181. Even where there is no intent to deceive, there may be such gross carelessness as to constitute conclusive evidence of fraudulent intent.—Alvarez vs. Brannan, 7 Cal., p. 503.

Subd. 2.—Conkey vs. Bond, 24 Barb., p. 276; People

vs. Kelley, 35 Barb., p. 444. A mistake is not either actual or constructive fraud.—Mercier vs. Lewis, 39 Cal., p. 532.

1574. Actual fraud is always a question of fact.

Actual
fraud a
question of
fact.

NOTE.—Dunham vs. Waterman, 17 N. Y., p. 21; Wilson vs. Forsyth, 24 Barb., p. 105; Ford vs. Chambers, 19 Cal., p. 143; see King vs. Davis, 34 Cal., p. 100, and Southworth vs. Resing, 3 Cal., p. 377; Billings vs. Billings, 2 Cal., p. 107. Where there is no dispute as to the facts, and the law upon these facts declares a transaction fraudulent, it is then not a question for the jury, but the Court may in such a case direct the jury how to find and set aside the verdict if they find to the contrary.—Chenery vs. Palmer, 6 Cal., p. 119.

1575. Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

Undue
influence,
what.

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

NOTE.—*Subd. 1.*—It may safely be stated as a general rule of equity, that no one can be permitted to make any selfish use of a personal confidence reposed in him. This rule is illustrated in a variety of forms, and sustained by numerous authorities, in the Title on Trusts. But it is also proper to be recognized in this place. It is not necessary, in such cases, to show that there was any deception practiced. It is sufficient to show that the confidence reposed was taken advantage of for purposes of gain.—See Sears vs. Shafer, 6 N. Y., pp. 268, 272; Bergen vs. Udall, 31 Barb., p. 9; Brock vs. Barnes, 40 Barb., p. 521; Baker vs. Bradley, 7 De G., M. & G., p. 597; Tyrrell vs. Bank of London, 10 H. of L. Cas., p. 26; Dent vs. Bennett, 4 Myl. & Cr., p. 269; 7 Sim., p. 539; Broun vs. Kennedy, 9 Jur. (N. S.), p. 1163; Davies vs. Davies, id., p. 1002. A parent may not acquire anything from his child by the slightest exercise of parental authority.—Bury vs. Oppenheim, 26 Beav.,

p. 594; *Bergen vs. Udall*, 31 Barb., p. 9; *Taylor vs. Taylor*, 8 How. U. S., p. 183; *Baker vs. Bradley*, 7 De G., M. & G., p. 597; see *Broun vs. Kennedy*, 9 Jur. (N. S.), p. 1163; *Davies vs. Davies*, id., p. 1002. And the same rule applies to any one standing in the relation of a parent (*Archer vs. Hudson*, 7 Beav., p. 551), as an uncle with whom his niece lived for a number of years (id.), or an elder sister, who had a great ascendancy over the mind of the grantor.—*Harvey vs. Mount*, 8 Beav., p. 439. So a deed from a lady to a clergyman whom she believed to be inspired, was set aside.—*Notidge vs. Prince*, 2 Giff., p. 246. Where agents, appointed by the Controller to investigate the condition of an insurance company which had applied to him, pursuant to statute, for leave to do business, after they had made their report, and had in fact no further power, insisted upon the payment of three hundred dollars as fees, threatening to revoke their report if the fees were not paid, it was held that the money paid under such a threat might be recovered back.—*Am. Ex. Fire Ins. Co. vs. Britton*, 8 Bosw., p. 148; see *Steele vs. Williams*, 8 Exch., p. 625; *Dew vs. Parsons*, 2 B. & Ald., p. 562; *Morgan vs. Palmer*, 2 B. & C., p. 729. Nothing more than a perverted use of the power of the party need be shown.

Subd. 2.—*Longmate vs. Ledger*, 6 Jur. (N. S.), p. 481; *Blackford vs. Christian*, 1 Knapp, p. 77; see *Tracy vs. Sacket*, 1 Ohio St., p. 58; *Rippy vs. Grant*, 4 Ired. Eq., p. 443; *Whiteburn vs. Hines*, 1 Munf., p. 557; *Dunn vs. Chambers*, 4 Barb., p. 376.

Subd. 3.—*Breck vs. Cole*, 4 Sandf., p. 88; *Bowes vs. Heaps*, 3 Ves. & B., p. 119; *Wood vs. Abrey*, 3 Madd., p. 423; *Gould vs. Okeden*, 4 Bro. P. C., p. 198; see *Cockshot vs. Bennet*, 2 T. R., p. 763; *Barnardiston vs. Lingwood*, 2 Atk., p. 133; *Thornhill vs. Evans*, id., p. 330; *Walmsley vs. Booth*, id., pp. 28, 29; *Berney vs. Pitt*, 2 Vern., p. 14; *Nott vs. Hill*, id., p. 27; *Wiseman vs. Beake*, id., p. 121; *Roche vs. O'Brien*, 1 Ball & B., pp. 337, 359; *Bromley vs. Smith*, 26 Beav., p. 664; 5 Jur. (N. S.), p. 837; *Lamplugh vs. Cox*, Dick., p. 411; *Heron vs. Heron*, 2 Atk., p. 160. These cases seem to support this view. They are generally classed under the head of fraud (see *Story Eq. Jur.*, Secs. 331-337); but the principle on which they depend is not a mere question of fraud.

1576. Mistake may be either of fact or law.Mistake,
what.

NOTE.—As to mistake of fact there is no question. Mistake of law has been often declared (and in fact well settled in this State) to be no ground for relief at law or in equity.—*Smith vs. McDougal*, 2 Cal., p. 586; *Gross vs. Parrott*, 16 Cal., p. 143; *Kenyon vs. Welty*, 20 Cal., p. 637; *Parsons vs. Fairbanks*, 22 Cal., p. 343; *Bart vs. Wilson*, 28 Cal., p. 632; see *Champlin vs. Laytin*, 13 Wend., p. 417; *Storrs vs. Parker*, 6 Johns. Ch., p. 166; *Lyon vs. Richmond*, 2 id., p. 61; *Kent vs. Manchester*, 29 Barb., p. 595; *Story's Eq. Jur.*, Secs. 111-139. The contrary view has been taken by Judges of high standing.—See *Champlin vs. Laytin*, 18 Wend., p. 422; *Many vs. Beekman Iron Co.*, 9 Paige, p. 188; *Stone vs. Godfrey*, 5 De G., M. & G., p. 90; *Broughton vs. Hutt*, 3 De G. & J., p. 501; *Evants vs. Strobe*, 11 Ohio, p. 480; see, also, *Wheeler vs. Smith*, 9 How. U. S., p. 55. This Chapter undoubtedly modifies the rule heretofore existing in this State as to mistake of law. The cases last cited above seem to have all been well considered. The rule that no relief should ever be granted on the ground of mistake of law seems too harsh and in some cases might work great hardship. There is, however, no doubt but that relief upon this ground must be granted with extreme caution and in only a limited class of cases.—See Sec. 1578.

1577. Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

Mistake of
fact.

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

NOTE.—“Not caused by the neglect of a legal duty.” *U. S. Bank vs. Bank of Georgia*, 10 Wheat., p. 343.
Subd. 1.—“Unconscious ignorance.”—*McDaniels vs. Bank of Rutland*, 29 Vt., p. 238; *Elwell vs. Chamberlain*, 4 Bosw., p. 320; *Kelly vs. Solari*, 9 M. & W., p. 54; *Briggs vs. Vanderbilt*, 19 Barb., p. 222-239; *Bell vs. Gardiner*, 4 M. & G., p. 11; 4 *Scott N. R.*, p. 621.
 “Forgetfulness.”—*Kelly vs. Solari*, 9 M. & W., p. 54; *Lucas vs. Worswick*, 1 Moo. & Rob., p. 293. This definition seems to cover all the cases of accident and

surprise against which relief can be had. "Of a fact past."—Willan vs. Willan, 16 Ves., p. 72; McCarthy vs. De Caix, 2 Russ & M., p. 614; Durkin vs. Cranston, 7 Johns., p. 442. "Or present."—Huthacher vs. Harris' Adm'r, 38 Penn. St., p. 491.

Subd. 2.—Reel vs. Hicks, 25 N. Y., p. 289; Kip vs. Monroe, 29 Barb., p. 579; Briggs vs. Vanderbilt, 19 id., p. 239; Gardner vs. Mayor, etc., of Troy, 26 id., p. 423; Wheadon vs. Olds, 20 Wend., p. 174; Mowatt vs. Wright, 1 id., p. 360; Allen vs. Mayor, etc., of N. Y., 4 E. D. Smith, p. 404; Hitchcock vs. Giddings, 4 Price, p. 135; Dan., 1; Hastie vs. Couturier, 9 Exch., p. 102; affirmed 5 H. of L. Cas., p. 673; Strickland vs. Turner, 7 Exch., p. 268; see Belknap vs. Sealey, 14 N. Y., p. 143; Martin vs. M'Cormick, 8 N. Y., p. 335; Ketchum vs. Bank of Commerce, 19 N. Y., p. 502. The *dicta* contained in some cases, to the effect that a mistake in respect of matters as to which the party had "means of knowledge," does not avoid a contract (see Mutual Life Ins. Co. vs. Wager, 27 Barb., p. 354; Clarke vs. Dutcher, 9 Cow., p. 674; Milnes vs. Duncan, 6 B. & C., p. 716), are not sustained by the decisions (see Allen vs. Mayor, etc., of N. Y., 4 E. D. Smith, p. 404; Kelly vs. Solari, 9 M. & W., p. 54), and have been finally overruled (Townsend vs. Crowdy, 8 C. B. [N. S.], p. 477; Bell vs. Gardiner, 4 M. & G., p. 11; Dails vs. Lloyd, 12 Q. B., p. 531.) For mistakes held to be mistakes of law, and not of fact, see California cases cited in note to Sec. 1576, ante. For relief afforded in cases arising from mistake of fact, and what constitutes such mistake, see Barfield vs. Price, 40 Cal., p. 535; Lestrade vs. Barth, 19 Cal., p. 660; Quivey vs. Baker, 37 Cal., p. 465; Wagenblast vs. Washburn, 12 Cal., p. 208; Hicks vs. Whiteside, 23 Cal., p. 404; Moss vs. Mayo, 23 Cal., p. 421; Zeile et al. vs. Dukes, 12 Cal., p. 479. Mistake is not constructive fraud. Mercier vs. Lewis, 39 Cal., p. 532.

Mistake of
law.

1578. Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of

which the others are aware at the time of contracting, but which they do not rectify.

NOTE.—*Subd. 1.*—Many vs. Beekman Iron Co., 9 Paige, p. 188; Hall vs. Reed, 2 Barb. Ch., p. 501; see Pitcher vs. Turin Plank Road Co., 10 Barb., p. 436; Wake vs. Harrop, 6 H. & N., p. 768.

Subd. 2.—In Cooke vs. Nathan, 16 Barb., p. 342, it was held that a misrepresentation of the law by one party, upon which the other ignorantly relied, was a fraud. It seems to follow that a transaction such as is described in the text should be relieved against, as a mistake, if not as a fraud. See note to Sec. 1576.

1579. Mistake of foreign laws is a mistake of fact. Mistake of foreign laws.

NOTE.—Bank of Chillicothe vs. Dodge, 8 Barb., p. 233; McCormick vs. Garnett, 5 De G., M. & G., p. 278; Haven vs. Foster, 9 Pick., p. 113; Leslie vs. Bailie, 2 You. & C. Ch., p. 91; see Merchants' Bank vs. Spalding, 12 Barb., p. 302.

1580. Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases defined by the Chapter on Interpretation, they are to be deemed so to agree without regard to the fact. Mutuality of consent.

NOTE.—“Same thing.”—Scranton vs. Booth, 29 Barb., p. 171; Salters vs. Pruyn, 18 How. Pr., p. 512. “In the same sense.”—Hazard vs. New England Ins. Co., 1 Sumn., p. 218. In Bruce vs. Pearson, 3 Johns., p. 534, it was held that if a person sends an order to a merchant to send him a certain quantity of goods on certain terms of credit, and the merchant sends a less quantity of goods on a shorter credit, and the goods sent are lost by the way, the merchant must bear the loss, for there is no contract express or implied between the parties. So where shingles were sold and delivered at three dollars and twenty-five cents, but there was a dispute as to whether the three dollars and twenty-five cents was for a bunch or for a thousand, it was held that unless both parties had understandingly assented to one of those views, there was no special contract as to the price.—Greene vs. Bateman, 2 Woodb. & M., p. 359.

1581. Consent can be communicated with effect, only by some act or omission of the party contracting, Communication of consent.

by which he intends to communicate it, or which necessarily tends to such communication.

NOTE.—This excludes the possible case of a declaration of consent made to a person having no interest in the contract, and communicated by him to the other party, without authority. A mere voluntary compliance with the conditions of a proposed contract by one who had not previously assented to it, does not render the other liable on it.—*Johnston vs. Fessler*, 7 Watts, p. 48; *Ball vs. Newton*, 7 Cush., p. 599. In *Meynell vs. Surtees*, 31 E. L. & E., p. 475, certain parties were desirous of constructing a railway on the way-leave principle, and for that purpose entered into negotiations with a land owner, and proposed terms which were discussed, but not agreed to. The company went forward, however, and constructed their road. *Held*: that the acquiescence of the land owner in the construction of the road did not amount to an acceptance of the terms proposed by the company.

Mode of communicating acceptance of proposal.

1582. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

NOTE.—*Dunlop vs. Higgins*, 1 H. of L. Cas., pp. 381-398; *Vassar vs. Camp*, 11 N. Y., p. 451.

When communication deemed complete.

1583. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section.

NOTE.—This section recognizes the rule that consent is complete as soon as a letter of acceptance is put into the Post Office.—*Mactier vs. Frith*, 6 Wend., p. 103; *Vassar vs. Camp*, 11 N. Y., p. 441; *Dunlop vs. Higgins*, 1 H. L. Cas., p. 381; *Taylor vs. Merchants' Fire Ins. Co.*, 9 How., U. S., p. 390; *Eliason vs. Henshaw*, 4 Wheat., p. 228; *Hamilton vs. Lycoming Ins. Co.*, 5 Penn. St., p. 339; *Averill vs. Hedge*, 12 Conn., p. 436; *Beckwith vs. Cheever*, 1 Fost., N. H., p. 41; *Duncan vs. Topham*, 8 C. B., p. 225. To the contrary is *Gillespie vs. Edmonston*, 11 Humph., Tenn., p. 553.

1584. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.

Acceptance
by performance
of
conditions.

NOTE.—“Performance of the conditions of a proposal.”—Harvey vs. Johnston, 6 C. B., p. 304; see Kenyon vs. People, 26 N. Y., p. 203. “Acceptance of the consideration,” etc.—Decker vs. Judson, 16 N. Y., p. 446. So the conditions of a grant are accepted by an acceptance of the grant.—Spalding vs. Hallenbeck, 30 Barb., p. 292.

1585. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal.

Acceptance
must be
absolute.

NOTE.—Hough vs. Brown, 19 N. Y., pp. 114, 115; Code La., 1799; Borland vs. Guffey, 1 Grant, Pa., p. 394; Duke vs. Andrews, 2 Exch., p. 290; Jordon vs. Norton, 4 M. & W., p. 155; Woutner vs. Sharp, 4 C. B., pp. 404-441; Routledge vs. Grant, 4 Bing., p. 653; Cheveley vs. Fuller, 13 C. B., p. 122.

1586. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

Revoca-
tion of
proposal.

NOTE.—Stephens vs. Buffalo and N. Y. R. R. Co., 20 Barb., p. 332; Eskridge vs. Glover, 5 Stew. & Port., p. 264; see Boston & Me. R. R. vs. Bartlett, 3 Cush., p. 224; but a proposal cannot be revoked after acceptance is communicated.—Routledge vs. Grant, 4 Bing., p. 653; Head vs. Diggon, 3 Man. & R., p. 97; Cooke vs. Oxley, 3 T. R., p. 653.

1587. A proposal is revoked:

1. By the communication of notice of revocation by the proposer to the other party, in the manner prescribed by Sections 1581 and 1583, before his acceptance has been communicated to the former;
2. By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance;

Revoca-
tion, how
made.

3. By the failure of the acceptor to fulfill a condition precedent to acceptance; or,
4. By the death or insanity of the proposer.

NOTE.—*Subd. 1.*—See note to last section.

Subd. 2.—An owner of land proposed to the plaintiff that he might take timber from the land upon paying for it in a certain way. The plaintiff said he would accept the proposition if he could get his brother to assist him. The owner told the plaintiff that plaintiff need not give a decided answer then, but might do so thereafter. Plaintiff afterward engaged his brother to assist him in cutting the timber, but never notified the land owner that he had accepted his proposition. Subsequently the owner made the same proposition to defendants, who entered upon the land, cut, and carried away the timber. The plaintiff brought an action on the case against them. *Held:* that what passed between the plaintiff and the land owner was a mere proposition, not accepted; that no contract was made, and the action could not be maintained.—*Beckwith vs. Cheever*, 1 *Forst.*, N. H., p. 41; see, also, *Peru vs. Turner*, 1 *Fairf.*, p. 185; *Moxley vs. Moxley*, 2 *Metc.*, Ky., p. 309.

Subd. 4.—*The Palo Alto, Daveis*, p. 356.

Ratification of contract, void for want of consent.

1588. A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent.

NOTE.—“Solely for want of consent.”—*Gray vs. Hook*, 4 *N. Y.*, p. 449. “Subsequent consent.”—*Newton vs. Bronson*, 13 *N. Y.*, p. 595; *Bronson vs. Wiman*, 8 *id.*, p. 188; see *Sweetman vs. Prince*, 26 *id.*, p. 224.

Assumption of obligation by acceptance of benefits.

1589. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.

NOTE.—*Bennett vs. Judson*, 21 *N. Y.*, p. 238.

CHAPTER IV.

OBJECT OF A CONTRACT.

SECTION 1595. Object, what.

1596. Requisites of object.

1597. Impossibility, what.

1598. When contract wholly void.

1599. When contract partially void.

1595. The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do. Object,
what.

NOTE.—*Martin vs. McCormack*, 8 N. Y., p. 335.

1596. The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed. Requisites
of object.

NOTE.—For a definition of the word "lawful," see Chapter V of this Title. "And possible."—*Tufnell vs. Constable, Ad. & El.*, p. 798, and note. "And ascertainable."—*Code La.*, § 1880; *Richards vs. Edick*, 17 Barb., p. 260; *Abeel vs. Radcliff*, 13 Johns., p. 300; see *Tracy vs. Albany Exch. Co.*, 7 N. Y., p. 474. "By the time when the contract is to be performed." Thus, an agreement to pay so much as a barrel of flour may be worth on a particular day is a common and perfectly valid contract. So an agreement to pay so much as certain persons shall decide is valid.—*Brown vs. Bellows*, 4 Pick., p. 189.

1597. Everything is deemed possible except that which is impossible in the nature of things. Impossi-
bility, what

NOTE.—Impossibility is to be determined, not by the means or ability of the party, but by the nature of things.—*Code La.*, §§ 1885, 2028; see *McNeill vs. Reed*, 9 Bing., p. 68; *Beebe vs. Johnson*, 19 Wend., p. 500; *Harmony vs. Bingham*, 12 N. Y., p. 99; *Warfield vs. Watkins*, 30 Barb., p. 395; *Tufnell vs. Constable*, 7 Ad. & El., p. 798. Thus, a promise to procure the assent of a third person to any lawful and proper act is valid.—*Lloyd vs. Crispe*, 5 Taunt., p. 249; *McNeill vs. Reed*, 9 Bing., p. 68.

When
contract
wholly void

1598. Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

NOTE.—“Object unlawful.”—See *Smith vs. Wilcox*, 24 N. Y., p. 353; *Porter vs. Havens*, 37 Barb., p. 343; *Devlin vs. Brady*, 32 id., p. 518. “In whole or in part.”—*Brown vs. Brown*, 34 Barb., p. 533; *Hopkins vs. Prescott*, 4 C. B., p. 578. “Impossible of performance.”—See *Faulkner vs. Lowe*, 2 Exch., p. 595. “The entire contract is void.”—*Haskell vs. McHenry*, 4 Cal., p. 411; *Norris vs. Harris*, 15 Cal., p. 226; *Valentine vs. Stewart*, 15 Cal., p. 387.

When
contract
partially
void.

1599. Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.

NOTE.—See *Bank of Australasia vs. Bank of Australia*, 6 Moore P. C., p. 152; *Leavitt vs. Palmer*, 3 N. Y., p. 37; *Chase's Ex'r vs. Burkholder*, 18 Penn. St., p. 50; *Kerrison vs. Cole*, 8 East., p. 236.

CHAPTER V.

CONSIDERATION.

SECTION 1605. Good consideration, what.

1606. How far legal or moral obligation is a good consideration.

1607. Consideration lawful.

1608. Effect of its illegality.

1609. Consideration executed or executory.

1610. Executory consideration.

1611. How ascertained.

1612. Effect of impossibility of ascertaining consideration.

1613. Same.

1614. Written instrument presumptive evidence of consideration.

1615. Burden of proof to invalidate sufficient consideration.

1605. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

Good consideration,
what.

NOTE.—“Any benefit conferred.”—*Comstock vs. Breed*, 12 Cal., p. 286; *Johnson vs. Titus*, 2 Hill, p. 606; *Oakley vs. Boorman*, 27 Wend., p. 588; see *Hamilton College vs. Stewart*, 1 N. Y., p. 581; *Palmer vs. North*, 35 Barb., p. 282. It is immaterial whether the benefit is small or great.—*Haight vs. Brooks*, 10 Ad. & El., p. 309; *Johnston vs. Nicholls*, 1 C. B., p. 251. “Or agreed to be conferred.”—*Houghtaling vs. Randen*, 25 Barb., p. 21; *Sage vs. Hazard*, 6 id., p. 179; *Seaman vs. Hasbrouck*, 35 id., p. 151; *Briggs vs. Tiltonson*, 8 Johns., p. 304. “Upon the promisor by any other person.”—*Lawrence vs. Fox*, 20 N. Y., p. 268; *Judson vs. Gray*, 17 How. Pr., pp. 289-296. “To which the promisor is not lawfully entitled.”—See *Adams vs. Hastings*, 6 Cal., p. 126. Forbearance of a claim which the claimant knows to be totally unfounded, is no consideration.—*Wade vs. Simeon*, 2 C. B., p. 548; *Dolcher vs. Fry*, 37 Barb., p. 152; *Morey vs. Newfane*, 8 id., p. 645. But forbearance of a claim in the least doubtful, made in good faith, even if unfounded, will support a promise.—*Crans vs. Hunter*, N. Y. Ct. of Appeals, Jan., 1864; *Russell vs. Cook*, 3 Hill, p. 504; *Seaman vs. Seaman*, 12 Wend., p. 381; *Longridge vs. Dorville*, 5 B. & Ald., p. 117; see, also, *Racouillat vs. Sansevain*, 32 Cal., p. 376, where a claim set up by children to a part of the common property upon the death of mother was held a sufficient consideration to support an agreement of compromise with their father by which they conveyed to him, and he promises to pay them a consideration therefor. The fulfillment, at the request of A, of a promise previously made to B, has been held a sufficient consideration for a promise by A.—See *Scotson vs. Pegg*, 6 H. & N., p. 295. “Or any prejudice suffered.”—*Kelly vs. Lynch*, 22 Cal., p. 661; *Waydell vs. Luer*, 3 Den., p. 410; *Livingston vs. Radcliff*, 6 Barb., p. 201; *Miller vs. Drake*, 1 Caines, p. 45; *Rutgers vs. Lucet*, 2 Johns. Cas., p. 92; *Parker vs. Crane*, 6 Wend., p. 647; *Stuart vs. McGuin*, 1 Cow., p. 99; *Elting vs. Vanderlyn*, 4 Johns.,

p. 237; *Smith vs. Weed*, 20 Wend., p. 184; *Heinman vs. Moulton*, 14 Johns., p. 466; *Hilliard vs. Austin*, 17 Barb., p. 141. "Or agreed to be suffered."—*Decker vs. Judson*, 16 N. Y., p. 449; *Smith vs. Algar*, 1 Barn. & Ad., p. 603; *Conover vs. Brush*, 2 N. Y. Leg. Obs., p. 289. "By such person."—*Decker vs. Judson*, 16 N. Y., p. 449. "Other than such as he is lawfully bound to suffer."—*Livingston vs. Rogers*, 1 Caines R., p. 583; *Utica & Syracuse R. R. vs. Brinckerhoff*, 21 Wend., p. 139; *Roscorla vs. Thomas*, 3 Q. B., p. 234. A past and executed consideration is not sufficient. When the debt of A already created is promised to be paid by B, no new term being introduced in the contract, as delay or the like, it is not binding upon B, there being no consideration.—*Comstock vs. Breed*, 12 Cal., p. 286; but see *Feeny vs. Daly*, 8 Cal., p. 84. Where A appeals from a judgment against him, and B becomes his surety on the appeal bond, and A to secure B for his liability on the appeal bond assigns to B a liquidated demand held by A against third parties, the liability of B on appeal bond is sufficient consideration for the assignment.—*Hobbs vs. Duff*, 23 Cal., p. 596. Paying part of a note when all is due, was held no consideration for an agreement to extend the time of payment.—*Liening vs. Gould*, 13 Cal., p. 598; see, also, *McCann vs. Lewis*, 9 Cal., p. 246. A note given for the release of property seized for a toll imposed by a State law on logs and lumber floating down a stream from that State into another State, was held without consideration, the toll being illegal. *C. L. R. Co. vs. Patterson*, 33 Cal., p. 334. An offer of reward, contained in an advertisement, is a conditional promise. If any one perform the service before the offer is revoked, it is a good consideration.—*Ryer vs. Stockwell*, 14 Cal., p. 134.

How far
legal or
moral obli-
gation is a
good con-
sideration.

1606. An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.

NOTE.—"Legal obligation."—*Spencer vs. Ballow*, 18 N. Y., p. 330. "Moral obligation." The common law does not recognize moral obligations, except in a few cases, as sufficient to sustain a promise.—*Whiple*

vs. Dewey, 8 Cal., p. 36; Nash vs. Russell, 5 Barb., p. 556; Geer vs. Archer, 2 Barb., p. 420; Watkins vs. Halstead, 2 Sandf., p. 311; Ehle vs. Judson, 24 Wend., p. 97; Smith vs. Ware, 13 Johns., p. 257; Beaumont vs. Reeve, 8 Q. B., p. 483; Eastwood vs. Kenyon, 11 Ald. & El., p. 438. But see, to the contrary, Doty vs. Brown, 14 Johns., p. 381; Lee vs. Muggeridge, 5 Taunt., p. 36. The authorities, however, entirely fail to establish any satisfactory principle upon which to distinguish between the different species of moral obligations. Thus, in Bunn vs. Winthrop, 1 Johns. Ch., p. 329, past seduction was held a good consideration to support a grant. In Beaumont vs. Reeve, 8 Q. B., p. 483, the same consideration was held insufficient to support a promise. In Goulding vs. Davidson, 28 Barb., p. 438, it is said that there must have been, at some time, an actual *legal* obligation. Yet in Rice vs. Welling, 5 Wend., p. 595, and Early vs. Mahon, 19 Johns., p. 147, the original contract was usurious, and therefore void from the beginning. The same may be said of promises to pay debts contracted in infancy, which are held valid. Goulding vs. Davidson was reversed.—26 N. Y., p. 604. The rule stated in the text seems to be just, and to be, on the whole, as easily reconcilable with the authorities as any other that can be devised. "To an extent corresponding with the extent of the obligation, but no further or otherwise."—See Phetteplace vs. Steere, 2 Johns., p. 442; Roscorlo vs. Thomas, 3 Q. B., p. 234; Hopkins vs. Logan, 5 M. & W., p. 247; Kaye vs. Dutton, 8 Scott N. R., pp. 495, 502; S. C., Ray vs. Dutton, 7 Man. & G., p. 807; Elderton vs. Emmens, 6 C. B., p. 160; 13 id., p. 495.

1607. The consideration of a contract must be lawful within the meaning of Section 1667.

Consideration lawful.

1608. If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

Effect of its illegality.

NOTE.—This principle is deducible from all the cases taken together, though not to be found thus stated in any one case. Thus, there is no doubt that if the consideration is single, or in other words indivisible, its partial illegality is fatal to the contract.—Sue Valentine vs. Stewart, 15 Cal., p. 387; Haskell vs. McHenry, 4 Cal., p. 411; Norris vs. Harris, 15 Cal., p. 226; Mills vs. Mills, 36 Barb., p. 474; Rose vs. Truax, 21 id., p.

361; *Pepper vs. Haight*, 20 id., p. 429; *Barton vs. Port Jackson Plank Road Co.*, 17 id., p. 397; *Burt vs. Place*, 8 Cow., p. 431; see *Brown vs. Brown*, 34 Barb., p. 533; *Porter vs. Havens*, 37 id., p. 343. The limitations of the rules are conformable to the principle of Secs. 1598 and 1599.

Consideration
executed or
executory.

1609. A consideration may be executed or executory, in whole or in part. In so far as it is executory it is subject to the provisions of Chapter IV of this Title.

Executory
consideration.

1610. When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person, or regulated by any specified standard.

NOTE.—“Not indispensable that the contract should specify its amount or the means of ascertaining it.” So held as to sales.—*Hoadly vs. McLaine*, 10 Bing., p. 487; *Joyce vs. Swann*, 17 C. B. (N. S.), p. 84. “May be left to the decision of a third person.” So held as to the price of goods sold.—*Brown vs. Bellows*, 4 Pick., p. 189. “Or regulated by any specified standard.” There is, perhaps, no precedent for a general provision of this kind under the head of contracts; but as it applies to contracts of sale, hire, employment, deposit, carriage, and insurance, there is no reason why it should work injustice if applied to other contracts, though probably it will scarcely ever be needed for them.

How ascer-
tained.

1611. When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

NOTE.—*Hoadly vs. McLaine*, 10 Bing., p. 487; *Brown vs. Bellows*, 4 Pick., p. 189.

Effect of
impossibility
of ascertaining
consideration.

1612. Where a contract provides an exclusive method by which its consideration is to be ascer-

tained, which method is on its face impossible of execution, the entire contract is void.

NOTE.—Pothier on Sale, N. 24.

1613. Where a contract provides an exclusive Same. method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible of execution, such provision only is void.

NOTE.—Pothier (Sale, N. 34) holds that the contract in such case is voidable, and this view has been adopted by some writers in this country (Story on Sales, Sec. 220; 1 Pars. Cont., 5th ed., p. 525), but it seems more probable that the common law would regard the contract as made for a reasonable consideration, to be ascertained in any usual way. Thus, where a covenant to renew a lease provides for an arbitration to determine the rent, and no award is ever made, the Court will enforce the renewal at a reasonable rent.—Reformed Dutch Church vs. Parkhurst, 4 Bosw., p. 491; Dunnell vs. Keteltas, 16 Abb. Pr., p. 205.

1614. A written instrument is presumptive evidence of a consideration.

Written
instrument
presumptive
evidence of
consideration.

NOTE.—Riggs vs. Waldo, 2 Cal., p. 485; Stewart vs. Street, 10 Cal., p. 372; Spear vs. Ward, 20 Cal., p. 659. It is only presumptive, however, and may be inquired into.—Fisher vs. Salmon, 1 Cal., p. 413; Coles vs. Soulsby, 21 Cal., p. 47; Bennett vs. Solomon, 6 Cal., p. 134. At common law, a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of consideration being conclusive. The law of this State modified the rule so far as to allow it to be rebutted in the answer.—McCarty vs. Beach, 10 Cal., p. 461; Wills vs. Kempt, 17 Cal., p. 98. The unmeaning distinction between sealed and unsealed instrument being done away with by statute, the consideration of a sealed bond may be impeached.—Comstock vs. Breed, 12 Cal., p. 286.

1615. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

Burden of
proof to
invalidate
sufficient
consideration.

NOTE.—See cases cited to note on preceding section.

TITLE II.

MANNER OF CREATING CONTRACTS.

SECTION 1619. Contracts, express or implied.

1620. Express contract, what.

1621. Implied contract, what.

1622. What contracts may be oral.

1623. Contract not in writing through fraud, may be enforced against fraudulent party.

1624. What contracts must be written.

1625. Effect of writing.

1626. Contract in writing, takes effect when.

1627. Provisions of Chapter on transfers of real property.

1628. Corporate seal, how affixed.

1629. Provisions abolishing seals made applicable.

Contracts,
express or
implied.

1619. A contract is either express or implied.

NOTE.—The only difference between an express and an implied contract, not under seal, is in the mode of substantiating it.—See *Smith vs. Moynihan*, July Term, 1872, Sup. Ct. Cal. An express contract is proved by an actual agreement. An implied contract by circumstances, and the course of dealing between the parties. But whenever a contract is once proved, the consequences resulting from the breach of it must be the same whether it be proved by direct or circumstantial evidence.—*Marzetti vs. Williams*, 1 B. & Ad., p. 423; *Hilliard on Contracts*, p. 52.

Express
contract,
what.

1620. An express contract is one, the terms of which are stated in words.

NOTE.—Story on Contracts, § 11.

Implied
contract,
what.

1621. An implied contract is one, the existence and terms of which are manifested by conduct.

NOTE.—Story on Contracts, § 11. The ordinary definition of an implied contract includes obligations imposed by law upon parties, as between each other. These obligations are, however, considered in another part of the Code.

What con-
tracts may
be oral.

1622. All contracts may be oral, except such as are specially required by statute to be in writing.

NOTE.—See *Bank of Rochester vs. Jones*, 4 N. Y., p. 497; *Flory vs. Denny*, 7 Exch., p. 581.

1623. Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

Contract . . . not in writing through fraud, may be enforced against fraudulent party.

NOTE.—Story Eq. Jur., Sec. 768. This principle of equity ought to be recognized in all cases, whether legal or equitable.

Am

1624. The following contracts, or some memorandum thereof, expressing the parties, their consent, and the object of the contract, must be in writing, subscribed by the party to be charged thereby, or by his agent for the purpose:

What contracts must be written.

1. An agreement that by its terms cannot be fully performed within one year;
2. An agreement made upon consideration of marriage, other than mutual promises to marry.

NOTE.—The consideration is no longer necessary to be stated, thus changing the law heretofore existing in this State. The names of *all* the parties must be stated in the memorandum.—Williams vs. Lake, 2 El. & El., p. 349. The whole object of the contract and all its terms must be expressed.—Wright vs. Weeks, 25 N. Y., p. 153.

Subd. 1.—"Cannot be," etc.—The language of the statute was "*is not to be*," etc. In a similar statute in New York these words have been construed as applying only to contracts which cannot *possibly* be executed within a year, *under any contingency*. Thus, it was held that a parol (verbal) agreement, by which the defendant, for a valuable consideration, promised to furnish the plaintiff, at his residence, with proper and suitable board, clothing, and attention from the time of making said agreement during the plaintiff's natural life, she (the plaintiff) being then sixty-five years of age, was not void, as being a contract which, by its terms, was not to be performed within the year.—Dresser vs. Dresser, 35 Barb., p. 573. To bring a contract within the statute relating to parol agreements, not to be performed within one year, it must appear to be *necessarily incapable of performance* within that time. Thus,

where by the terms of a verbal promise it was to be performed as soon as the promisor received the amount, secured by a mortgage, which he held against a third person, it was *held*, that the promise was valid, even though the mortgage did not become due until more than a year thereafter.—*Artcher vs. Zeh*, 5 Hill, p. 200; *Plimpton vs. Curtiss*, 15 Wend., p. 336; *McLees vs. Hale*, 10 id., p. 426; *Moore vs. Fox*, 10 Johns., p. 244; compare *Day vs. N. Y. Central R. R.*, 31 Barb., p. 548; *Pitkin vs. Long Island R. R.*, 2 Barb. Ch. R., p. 221; see *Talmadge vs. Rensselaer and Saratoga R. R.*, 13 Barb., p. 593. “Fully performed.”—It must be capable of full and complete performance.—*Day vs. N. Y. Central R. R.*, 31 Barb., pp. 548-556; *Amburger vs. Marvin*, 4 E. D. Smith, p. 393; *Lockwood vs. Barnes*, 3 Hill, p. 128; *Broadwell vs. Getman*, 2 Den., p. 87; *Bracegirdle vs. Heald*, 1 Barn. & Ald., p. 722. The words “from the making thereof,” which occurred in the former law (Hittell, ¶ 3156), are omitted. The strictness of this provision has frequently worked injustice; few yearly contracts go into effect immediately. This harmonizes the rules in relation to contracts affecting both real and personal property.—See *Young vs. Drake*, 5 N. Y., p. 463. The former laws contained the clause, “every special promise to answer for the debt, default, or miscarriage of another,” which has been omitted in this place. It will be found in a different form in another part of the Code. (See Secs. 2787 and 2793, post. For a full discussion of the various provisions of the Statute of Frauds, see extensive note to Sec. 1739, post.

Effect
of writing.

1625. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

NOTE.—See *Baker vs. Higgins*, 21 N. Y., p. 396; *Lamatt vs. Hudson Riv. Ins. Co.*, 17 N. Y., p. 199n; *Durgin vs. Ireland*, 14 N. Y., p. 322. As explained in *Blossom vs. Griffin*, 13 N. Y., p. 573. To same effect, *Gridley vs. Dole*, 4 N. Y., p. 486; *Witbeck vs. Waine*, 16 id., p. 532; *Lewis vs. Jones*, 7 Bosw., p. 366; see, also, *Jungerman vs. Bovee*, 19 Cal., p. 354. The contract of an indorser of a promissory note is a written one, and his liability is conditional to pay upon a proper demand and notice. This written contract cannot be

changed from a conditional to an absolute one by parol evidence of a verbal promise made by the indorser at the time of indorsement to pay the note without demand or notice.—*Goldman vs. Davis*, 23 Cal., p. 256. Stipulations are merged in the writing, and in the absence of fraud, accident, or mistake, the writing is the exclusive medium of ascertaining the agreement to which the parties bound themselves.—*Id.*

1626. A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.

Contract in writing, takes effect when.

NOTE.—*Verplank vs. Sterry*, 12 Johns., p. 536; compare *Elsey vs. Metcalf*, 1 Den., p. 323.

1627. The provisions of the Chapter on Transfers in General, concerning the delivery of grants, absolute and conditional, apply to all written contracts.

Provisions of Chapter on transfers of real property.

1628. A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.

Corporate seal, how affixed.

NOTE.—See Sec. 14, ante, Subd. 29.

1629. All distinctions between sealed and unsealed instruments are abolished.

Provisions abolishing seals made applicable.

NOTE.—Whether a seal was, at common law, evidence of a consideration, or whether it was regarded as dispensing with the necessity of any consideration, actual or implied, and as imparting validity to a contract upon entirely different grounds, may be doubtful. It has been held in this State, however, heretofore, that a seal was but presumptive evidence of consideration. It is now unnecessary to state a consideration in any contract. See Sec. 1624, ante, and notes. Some other distinctions are made at common law, which have no substantial foundation in reason. Thus, an instrument under seal, signed by an agent in his own name, does not bind his principal (*Townsend vs. Hubbard*, 4 Hill, p. 351; *Townsend vs. Corning*, 23 Wend., p. 435; *Berkley vs. Hardy*, 5 B. & C., p. 355), though a contract not under seal, signed in this manner, would bind him.—*McDonald vs. Bear River Co.*, 13 Cal., p. 220; *Stanton vs. Camp*, 4 Barb., p. 274; see *Evans vs. Wells*, 22 Wend., p. 324; *Townsend vs. Hubbard*, 4 Hill, p. 351. In Connecticut, this technical distinc-

tion does not exist.—*Magill vs. Hinsdale*, 6 Conn., p. 464. Many such instances could be cited as arguments in favor of the discontinuance of the unmeaning distinction between sealed and unsealed instruments.

TITLE III.

INTERPRETATION OF CONTRACTS.

SECTION 1635. Uniformity of interpretation.

- 1636. Contracts, how to be interpreted.
- 1637. Intention of parties, how ascertained.
- 1638. Intention to be ascertained from language.
- 1639. Interpretation of written contracts.
- 1640. Writing, when disregarded.
- 1641. Effect to be given to every part of contract.
- 1642. Several contracts, when taken together.
- 1643. Interpretation in favor of contract.
- 1644. Words to be understood in usual sense.
- 1645. Technical words.
- 1646. Law of place.
- 1647. Contracts explained by circumstances.
- 1648. Contract restricted to its evident object.
- 1649. Interpretation in sense in which promisor believed promisee to rely.
- 1650. Particular clause subordinate to general intent.
- 1651. Contract, partly written and partly printed.
- 1652. Repugnancies, how reconciled.
- 1653. Inconsistent words rejected.
- 1654. Words to be taken most strongly against whom.
- 1655. Reasonable stipulations, when implied.
- 1656. Necessary incidents implied.
- 1657. Time of performance of contract.
- 1658. Time, when of essence.
- 1659. When joint and several.
- 1660. Same.
- 1661. Executed and executory contracts, what.

Uniformity
of interpre-
tation,

1635. All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code.

Contracts,
how to be
interpreted

1636. A contract must be so interpreted as to give effect to the mutual intention of the parties as it ex-

isted at the time of contracting, so far as the same is ascertainable and lawful.

NOTE.—“Mutual.” The intention of *both* parties must be considered.—*Briggs vs. Vanderbilt*, 19 Barb., pp. 222, 240. “Intention of the parties.”—*Belmont vs. Coman*, 22 N. Y., p. 439; *Platt vs. Lott*, 17 id., p. 478. The intention of the parties must govern.—*Piercy vs. Crandall*, 34 Cal., p. 334; *Pierson vs. McCahill*, 23 Cal., p. 249; *Pierce vs. Robinson*, 13 Cal., p. 116; *Racouillat vs. Sansevain*, 32 Cal., p. 376; *Saunders vs. Clark*, 29 Cal., p. 299; *Frankel vs. Stern*, July Term, 1872, Sup. Ct. Cal. “At the time of contracting.”—*Story Cont.*, Sec. 656; *Liddle vs. Market Fire Ins. Co.*, 4 Bosw., p. 179. Parol evidence is admissible to explain the intention of the parties. And when the intention is thus ascertained, if the words will fairly bear a construction which will express that intention, the words will be so construed, and that interpretation will be enforced as the contract of the parties.—*Branman vs. Mesick*, 10 Cal., p. 95; *Reamer vs. Nesmith*, 34 Cal., p. 624; *Hawley vs. Bader*, 15 Cal., p. 44. Where a written instrument is signed and executed by the parties, and at the same time an addition is made in writing upon the same paper, beneath the signature, which additional writing is not signed by either of the parties, evidence may be introduced to show whether the parties intended this addition to form part of the contract.—*Verzan vs. McGregor*, 23 Cal., p. 339; see, also, note to Sec. 1639.

1637. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this Chapter are to be applied.

Intention
of parties,
how ascer-
tained.

NOTE.—All rules give way if the intention of the parties is clearly manifested in opposition to them. *Platt vs. Lott*, 17 N. Y., p. 478. The admission of oral evidence is regulated by the Code of Civil Procedure; and, subject to the rules of evidence, there can be no doubt of the correctness of this proposition. Prof. Parsons (*Contracts*, 5th ed., vol. ii., p. 494) maintains, at some length, that the intention of the parties does not always control the interpretation of a contract, but it will be found that the cases which he cites in support of his views turn upon rules of evidence. For a full and complete reference to the decisions bearing upon the admissibility of evidence relating to the

interpretation of written instruments, see Code of Civil Procedure, Secs. 1856 to 1870, inclusive, and notes.

Intention
to be ascer-
tained
from
language.

1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

NOTE.—Code La., § 1940; see *Westcott vs. Thompson*, 18 N. Y., p. 367; *Norton vs. Woodruff*, 2 id., p. 153; *Buck vs. Burk*, 18 N. Y., p. 339. In a written instrument defining a certain boundary line where the word "north" was used, parol evidence was admitted to show that it was not intended to be "north" by the *true* meridian, but that the intention of the parties was that it should mean "north" by the *magnetic* meridian, it being the custom of the locality to run boundary lines in that manner.—*Jenny Lind Co. vs. Bower*, 11 Cal., p. 195. Where the language of a contract is not ambiguous, but of plain and obvious import, the rule is imperative to follow the language employed in its interpretation.—*Hawley vs. Brumagim*, 33 Cal., p. 394. "If it does not involve an absurdity." When the words of a bond are not sufficiently explicit, or if literally construed the words would be nonsense, it must be construed with reference to the intention of the parties. In doing this, it is allowable to depart from the letter of the condition—to reject insensible words and to supply obvious omissions.—*Frankel vs. Stern*, July Term, 1872, Sup. Ct. Cal. See further cases cited in note to succeeding section.

Interpre-
tation of
written
contracts.

1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

NOTE.—*Hawley vs. Brumagim*, 33 Cal., p. 394; *Wescott vs. Thompson*, 18 N. Y., p. 367. Parol evidence is not admissible to vary the terms of a written contract.—*Lennard vs. Vischer*, 2 Cal., p. 37; *Osborne vs. Hendrickson*, 7 Cal., p. 282. The written contract is considered the definite agreement of the parties, and parol conversations and understandings are merged in it.—*Conner vs. Clark*, 12 Cal., p. 168. But the rule of evidence that where the parties to a contract have reduced their agreement to writing, parol evidence shall not be received to alter or contradict the written instru-

ment, applies only between the parties to the agreement and those claiming under them, and does not apply to strangers to the agreement. When the rights of strangers are concerned, they are at liberty to show that the written instrument does not disclose the full or true character of the transaction; and if the stranger can do this, so also can a party to the agreement when contending with a stranger. Both must be bound by this rule, or neither.—*Smith vs. Moynihan*, July Term, 1872, Sup. Ct. Cal.; 2 Iredell R., p. 30; *Krider vs. Lafferty*, 1 Wharton R., p. 314; *Edgerly vs. Emerson*, 3 Foster R., p. 564. The rule which refuses the admission of parol evidence to vary the terms of a written instrument is directed to the language employed by the parties, and does not exclude an inquiry into the objects and purposes of the parties in executing the instrument.—*Pierce vs. Robinson*, 13 Cal., p. 116. Oral evidence admissible to explain a contract and aid in its interpretation, when and to what extent.—See *Brannan vs. Mesick*, 10 Cal., p. 95; *Richardson vs. Scott River W. & M. Co.*, 22 Cal., p. 150; *Hancock vs. Watson*, 18 Cal., p. 137; *Ruiz vs. Norton*, 4 Cal., p. 355; *Ferris vs. Coover*, 10 Cal., p. 589; *Reamer vs. Nesmith*, 34 Cal., p. 624; *Millard vs. Hathaway*, 27 Cal., p. 119; *Colton vs. Leavey*, 22 Cal., p. 496; *Pierson vs. McCahill*, 21 Cal., p. 122; *Pierson vs. McCahill*, 23 Cal., p. 249; *Gradwohl vs. Harris*, 29 Cal., p. 150; *Lockwood vs. Canfield*, 20 Cal., p. 126; *Verzan vs. McGregor*, 23 Cal., p. 339; *Brewster vs. Lathrop*, 15 Cal., p. 21; *Adler vs. Friedman*, 16 Cal., p. 138; *Palmer vs. Trip*, 8 Cal., p. 95; *Towdy vs. Ellis*, 22 Cal., p. 350; *McDonald vs. M. L. W. Co.*, 4 Cal., p. 335. A receipt acknowledging the payment of a debt, may be explained or contradicted by parol.—*Hawley vs. Bader*, 15 Cal., p. 44. And a deed absolute on its face, may be construed as a mortgage where such was the intention of the parties.—*Cunningham vs. Hawkins*, 27 Cal., p. 603; *Hooper vs. Jones*, 29 Cal., p. 18; *Lodge vs. Turman*, 24 Cal., p. 384; *Johnson vs. Sherman*, 15 Cal., p. 287. And this is not restricted alone to cases of fraud, accident, or mistake.—*Pierce vs. Robinson*, 13 Cal., p. 116.

The cases cited above in this note generally bear rather upon the admissibility of evidence, than upon the interpretation; but yet have some relation to the latter, and are therefore referred to in this place.

For cases involving the interpretation of contracts generally, see the able opinion of Justice Belcher, in the case of *Frankel vs. Stern*, July Term, Sup.

Ct. Cal.; Mickle vs. Sanchez, 1 Cal., p. 200; Von Schmidt vs. Huntington, 1 Cal., p. 55; Morrison vs. Wilson, 30 Cal., p. 344; Racouillat vs. Sansevain, 32 Cal., p. 876; Hancock vs. Watson, 18 Cal., p. 137; McNeil vs. Shirley, 33 Cal., p. 202; Hawley vs. Brumagim, 33 Cal., p. 394; Saunders vs. Clark, 29 Cal., p. 299; Ingoldsby vs. Juan, 12 Cal., p. 564; Haskell vs. Moore, 29 Cal., p. 437; Jackson vs. Beers, 14 Cal., p. 189; Blen vs. B. R. and A. M. and W. Co., 15 Cal., p. 96; Pierson vs. McCahill, 21 Cal., p. 122; Verzan vs. McGregor, 23 Cal., p. 399; O'Connor vs. Dingley, 26 Cal., p. 11; Anderson vs. Dall, 27 Cal., p. 607; Miller vs. Steen, 30 Cal., p. 402. Contract good in part, and bad in part.—Jackson vs. Shawl, 29 Cal., p. 267; Treadwell vs. Davis, 34 Cal., p. 601.

Writing,
when dis-
regarded.

1640. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

NOTE.—THROUGH FRAUD.—Where an applicant for a loan proposed to secure its repayment by a mortgage upon premises which he stated had been conveyed to him by a party named, and by false and fraudulent representations induced the lender to believe that certain valuable erections which were situate on adjacent premises were upon the premises so conveyed to him, and the lender made the loan and accepted the mortgage executed by the applicant containing a description of only these premises, and the applicant represented that the erections were embraced, and the mortgagor soon thereafter conveyed the lands on which the erections were situate, without consideration, in trust for his wife. In an action by the mortgagee against the mortgagor, his wife and her trustee, the trust deed was adjudged invalid against the mortgage. The mortgage was reformed so as to embrace the lands with the erections thereon, and a decree of foreclosure and sale was made as to all the premises.—*De Peyster vs. Hasbrouck*, 11 N. Y., p. 582; see *Pierce vs. Robinson*, 13 Cal., p. 116; *Wilcoxson vs. Burton*, 27 Cal., p. 233.

MISTAKE OR ACCIDENT.—A lease was ordered to be surrendered and canceled, with perpetual injunction against the lessor's proceeding to recover the rent reserved upon evidence that the demised premises were destroyed by fire after the execution of

the lease and before the commencement of the term thereby to be created, and that a condition agreed upon by the parties, that the lease should determine in case of a destruction of the premises by fire, had been omitted by accident or mistake.—Wood vs. Hubbell, 10 N. Y., p. 479. That a Court can correct mistakes in written agreements, see Frankel vs. Stern, July Term, 1872, Sup. Ct. Cal.; Wiser vs. Markly, 1 Johns. C. R., p. 607; Gillespie vs. Moore, 2 id., p. 585; Keisdback vs. Livingston, 4 id., p. 144; Story Eq. Jur., Vol. I, pp. 152-161, and cases there cited. If one of the terms of a written contract is left out by mistake when the same is drafted, the agreement will be interpreted and enforced to correspond with the intention of the parties.—Pierson vs. McCahill, 23 Cal., p. 249; see, specially, Pierson vs. McCahill, 21 Cal., p. 122; Gradwohl vs. Harris, 29 Cal., p. 150; Pierce vs. Robinson, 13 Cal., p. 116; and see note to preceding section. If a clause in a contract was inserted by mistake, it will be held void.—Verzan vs. McGregor, 23 Cal., p. 339. Under the Code of Civil Procedure it is not necessary that the contract should be reformed, but it should be construed according to the actual intent of the parties.—See Bidwell vs. Astor Ins. Co., 16 N. Y., p. 263; N. Y. Ice Co. vs. N. W. Ins. Co., 12 Abb. Pr., p. 414; 23 N. Y., p. 357; see, also, Burr vs. Broadway Ins. Co., 16 N. Y., p. 267. The proof must be clear.—Coles vs. Bowne, 10 Paige, p. 526; Lyman vs. Mut. Ins. Co., 2 Johns. Ch., p. 630. Affirmed.—17 Johns., p. 373. But this is a rule of evidence not necessary to be stated here.

1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

Effect to be given to every part of contract.

NOTE.—“Giving effect to every part.”—Frankel vs. Stern, July Term, 1872, Sup. Ct. Cal.; Mickle vs. Sanchez, 1 Cal., p. 200; Code La., § 1950; Code Napoleon, § 1161; Ward vs. Whitney, 8 N. Y., p. 446; Decker vs. Furniss, 14 id., pp. 615, 622; Hamilton vs. Taylor, 18 id., p. 358; Richards vs. Warring, 39 Barb., p. 42; James vs. Tallent, 5 B. & Ald., p. 889; Barton vs. Fitzgerald, 15 East., p. 541; see Simonds vs. Hodgson, 3 B. & Ad., p. 50. The recitals of a deed may restrict general words in its operative part.—Simons vs. Johnson, 3 B. & Ad., p. 175; Solly vs. Forbes, 2 Brod.

& B., p. 38; Payler vs. Homersham, 4 M. & Selw., p. 423; Lampon vs. Corke, 5 B. & Ald., p. 606; Bell vs. Bruen, 1 How. U. S., p. 184; Lawrence vs. M'Calmont, 2 id., p. 449. "If reasonably practicable."—Westcott vs. Thompson, 18 N. Y., p. 363. "Each clause helping to interpret the others."—Miller vs. Travers, 8 Bing., p. 244; Story Cont., Sec. 657; see Aikin vs. Western R. R. Co., 20 N. Y., p. 370; Haywood vs. Perrin, 10 Pick., p. 228; Gray vs. Clark, 11 Verm., p. 583; Merrill vs. Gore, 29 Me., p. 346; Sicklemore vs. Thistleton, 6 M. & Selw., p. 9.

Several contracts, when taken together.

1642. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.

NOTE.—Hamilton vs. Taylor, 18 N. Y., p. 358; Church vs. Brown, 21 N. Y., pp. 319, 330; Pepper vs. Haight, 20 Barb., p. 429. The same rule applies to deeds.—Huttemeier vs. Albro, 18 N. Y., p. 48; Wright vs. Douglass, 7 id., p. 574. Contracts between different parties (Craig vs. Wells, 11 N. Y., p. 315), or relating to different matters (Cornell vs. Todd, 2 Denio, p. 130), or not forming part of one transaction (Mann vs. Witbeck, 17 Barb., p. 388), cannot be taken together.—See case of Lockwood vs. Canfield, 20 Cal., p. 126; Verzan vs. McGregor, 23 Cal., p. 339, and note to Sec. 1636, ante. It is a familiar rule that where several papers concerning the same subject matter are executed by or between the same parties, at the same time, all are to be construed together as one instrument.—Ingoldsby vs. Juan, 12 Cal., p. 564.

Interpretation in favor of contract.

1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

NOTE.—"Lawful."—Co. Litt., p. 42; 2 Blacks. Com., p. 380; Chit. Cont. (4th ed.), p. 80; Sterry vs. Clifton, 9 C. B., p. 110; Harrington vs. Klopogge, 4 Doug., p. 5; see Clark vs. Pinney, 7 Cow., p. 681; Shore vs. Wilson, 9 Clark & F., p. 397. The language of a contract cannot be perverted in order to make it lawful.—See Porter vs. Havens, 37 Barb., p. 343; Mayor of Norwich vs. Norfolk Railway Co., 4 El. & Bl., p. 397. "Operative."—Richards vs. Warring, 39 Barb., p. 42; Archibald vs. Thomas, 3 Cow., p. 284; Boyd vs. Moyle, 2 C. B., p. 644; Russell vs. Phillips,

14 Q. B., p. 891; Pollock vs. Stacy, 9 id., p. 1033; Brown vs. Slater, 16 Conn., p. 192; Broom vs. Batchelor, 1 Hurlst. & N., p. 255; Mare vs. Charles, 5 El. & Bl., p. 978; Code Napoleon, § 1157; Saunders vs. Clark, 29 Cal., p. 299; Von Schmidt vs. Huntington, 1 Cal., p. 55; Hancock vs. Watson, 18 Cal., p. 137. "Definite."—See Casler vs. Conn. Mut. Ins. Co., 22 N. Y., p. 427. "Reasonable."—Frankel vs. Stern, July Term, 1872, Sup. Ct. Cal; Buck vs. Burk, 18 N. Y., p. 337; Braunstein vs. Accidental Death Ins. Co., 1 Best & Smith, p. 782; Jones vs. Gibbons, 8 Exch., p. 922; Dallman vs. King, 4 Bing. N. C., p. 105. See Thomas vs. Fleury, 26 N. Y., p. 26, in which it was held that a condition requiring a certain architect's certificate, before payment could be demanded, was waived by an *unreasonable* refusal of such certificate. "Without violating the intention of the parties." An unreasonable stipulation cannot be rejected, if it was clearly the intention of the parties that it should be a part of the contract.—Stadhard vs. Lee, 3 Best & Sm., p. 364. See, also, cases cited in note to Sec. 1639, ante.

1644. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Words to be understood in usual sense.

NOTE.—"Popular sense."—Story Cont., Sec. 647; Code La., § 1941; see Casler vs. Conn. Mut. Ins. Co., 22 N. Y., p. 427. "Rather than strict legal meaning." See Schenck vs. Campbell, 11 Abb. Pr., p. 292; Schuykill Nav. Co. vs. Moore, 2 Whart., p. 491. To the contrary see Rawlinson vs. Clarke, 14 M. & W., p. 187. "Insolvency," even in a State which has an insolvent law, has been construed to mean simple inability to pay debts, and not technical insolvency under the statute. Biddlecombe vs. Bond, 4 Ad. & El., p. 332; Parker vs. Gossage, 2 Cr. M. & R., p. 617. "Usage."—Smith vs. Wilson, 3 B. & Ad., p. 728; see Hinton vs. Locke, 5 Hill, p. 437; Astor vs. Union Ins. Co., 7 Cow., p. 202; Miller vs. Tetherington, 6 H. & N., p. 278; Cuthbert vs. Cumming, 11 Exch., p. 405; affirming 10 id., p. 809; Coit vs. Corn Ins. Co., 7 Johns., p. 385; Clife vs. Schwabe, 3 C. B., p. 469; see Jenny Lind Co. vs. Bower, 11 Cal., p. 195; see note to Sec. 1638, ante, and Code of Civil Procedure, Secs. 1861 and 1870, Subd. 12.

Contracting parties have the power to define the words which they use in the contract, and if the agreed definitions are free from ambiguity the contract will be enforced according to the definition thus assigned.—*Morrison vs. Wilson*, 30 Cal., p. 344. And it will be presumed, nothing to the contrary appearing, that the same meaning was intended wherever the like words are subsequently used.—*Saunders vs. Clark*, 29 Cal., p. 299. The grammatical construction is not always to be followed.—*Hancock vs. Watson*, 18 Cal., p. 137.

Technical words.

1645. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.

NOTE.—Code La., § 1942; *Dana vs. Fiedler*, 12 N. Y., p. 40. This is another, and probably a better form of the maxim, that "technical words are to be taken in their technical sense."—See *Worthington vs. Gimson*, 2 El. & El., p. 618; 6 Jur. (N. S.), p. 1053. A contrary intention will, however, prevail.—*Taylor vs. Caldwell*, 3 Best & Sm., p. 832; *James vs. Plant*, 4 Ad. & El., p. 749; see *Doe d. Hickman vs. Haslewood*, 6 id., p. 167; *Jenny Lind Co. vs. Bower*, 11 Cal., p. 195; see *Reynolds vs. Jourdon*, 5 Cal., p. 108; see *Morrison vs. Wilson*, 30 Cal., p. 344.

Law of place.

1646. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

NOTE.—"Law of the place where it is to be performed." Story Conf. Laws, Secs. 270, 280; *Everett vs. Vendryes*, 19 N. Y., p. 436; *Curtis vs. Leavitt*, 15 id., p. 9; *Bowen vs. Newell*, 13 id., p. 290; *Jacks vs. Nichols*, 5 id., p. 178; *Cutler vs. Wright*, 22 id., p. 480. "Where it is made."—Story Conf. Laws, Sec. 282; *Thompson vs. Ketcham*, 8 Johns., p. 189; *Pomeroy vs. Ainsworth*, 22 Barb., p. 118, 130; *Curtis vs. Leavitt*, 15 N. Y., p. 9; *Gibbs vs. Fremont*, 9 Exch., p. 25; *Jenny Lind Co. vs. Bower*, 11 Cal., p. 195; note to Sec. 1638.

1647. A contract may be explained by reference

to the circumstances under which it was made, and the matter to which it relates.

Contracts explained by circumstances.

NOTE.—“Circumstances under which it was made.” *Westcott vs. Thompson*, 18 N. Y., p. 363; *Blossom vs. Griffin*, 13 id., p. 569; *Moore vs. Meacham*, 10 id., p. 207; *Doolittle vs. Southworth*, 3 Barb., p. 79; *Hasbrook vs. Paddock*, 1 id., p. 635; *Turner vs. Evans*, 2 El. & Bl., p. 512; see *Schenck vs. Campbell*, 11 Abb. Pr., p. 292; *McNeil vs. Shirley*, 33 Cal., p. 202; *Brannan vs. Mesick*, 10 Cal., p. 95; *Hancock vs. Watson*, 18 Cal., p. 137; note to Sec. 1639 and cases cited therein. “Matter to which it relates.”—*Peacock vs. N. Y. Life Ins. Co.*, 20 N. Y., pp. 293, 296; *French vs. Carhart*, 1 id., p. 96; *Rex vs. Mashiter*, 6 Ad. & El., p. 153; 1 Nev. & P., p. 326.

1648. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

Contract restricted to its evident object.

NOTE.—Code La., § 1954; Code Napoleon, § 1163; see *Platt vs. Lott*, 17 N. Y., p. 478; *Lyll vs. Edwards*, 6 H. & N., p. 337; *Jackson vs. Stackhouse*, 1 Cow., p. 122; *Rich vs. Lord*, 18 Pick., p. 325; *Simons vs. Johnson*, 3 B. & Ad., p. 175; *Payler vs. Homersham*, 4 M. & Selw., p. 423; see Sec. 1639 and note.

1649. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

Interpretation in sense in which promisor believed promisee to rely.

NOTE.—A promise is interpreted in that sense in which the promisor knew the promisee understood it. Accordingly, where the vendor of land promised to execute such a conveyance as he had received from his grantor, which he said was a warranty deed—the same in fact containing only a covenant against the acts of the grantor—the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise a deed with a general warranty, and the vendor knew that such was his understanding; *held*, that the vendor was bound to convey with general warranty.—*Barlow vs. Scott*, 24 N. Y., p. 40; see *Mowatt vs. Londesborough*, 3 El. & Bl., p. 307, per *Campbell, C. J.*; *Wheelton vs. Hardisty*, 8 id., p. 284.

When the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended, at the time that the promisee received it. It is not the sense in which the promisor actually intended it that always governs the interpretation of an equivocal promise, because at that rate you might excite expectations which you never meant, nor would be obliged to gratify. Much less is it in the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements which you never designed to make. It must, therefore, be the sense (for there is no other remaining) in which the promisor believed the promisee accepted his promise. This will not differ from the actual intention of the promisor, when the promise is given without collusion or reserve; but we put the rule in the close form, to exclude evasion in cases in which the popular meaning of a phrase and the strict grammatical construction of the words differ; or, in general, wherever the promisor attempts to make his escape through some ambiguity in the expressions which he used.

"Temures promised the garrison of Sebastia that if they would surrender *no blood should be shed*. The garrison surrendered and Temures buried them all alive. Now, Temures fulfilled the promise in one sense, and in the same, too, in which he intended it at the time, but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it. * * * * *

From the principal 'that the obligation of a promisor is to be measured by the expectation which the promisor anyhow voluntarily and knowingly excites, results a rule which governs the construction of all contracts, and is capable, from its simplicity, of being applied with great care and certainty, viz.: *that whatever is expected by one side and known to be so expected by the other, is to be deemed a part or condition of the contract.*'"—Paley's Moral Philosophy, pp. 85, 97; see Code of Civil Procedure, Sec. 1864.

Particular
clause sub-
ordinate to
general
intent.

1850. Particular clauses of a contract are subordinate to its general intent.

NOTE.—Decker vs. Furniss, 14 N. Y., p. 615; Kelley vs. Upton, 5 Duer, p. 340; London Gaslight Co. vs.

Chelsea, 8 C. B. (N. S.), p. 215; see *Ringer vs. Cann*, 3 M. & W., p. 343; *Blen vs. B. R. and Auburn W. and Mining Co.*, 15 Cal., p. 96. O and D entered into a written contract, by which O was to erect a building for D, and D was to pay him certain amounts in installments as the building progressed, and at its completion, for the balance due, O was "to take D's note, to bear interest at the rate of two per cent, and payable twelve months after date, or before, *if D wishes to do so.*" Held: that the words "*if D wishes to do so,*" related to the time when the note should be payable, and do not mean that he had the option of giving his note or not.—*O'Connor vs. Dingley*, 28 Cal., p. 11.

1651. Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded.

Contract,
partly
written and
partly
printed.

NOTE.—"Written parts control the printed parts." *Harper vs. N. Y. City Ins. Co.*, 22 N. Y., p. 444; *Harper vs. Albany Ins. Co.*, 17 id., p. 198; *Woodruff vs. Coml. Mut. Ins. Co.*, 2 Hilt., p. 122; see *People vs. Saxton*, 22 N. Y., p. 309. "The parts which are original control those which are copied from a form." This is the real principle of the foregoing decisions. Printing is only evidence that the contract was partly formal and partly original.

1652. Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.

Repugnancies, how
reconciled.

NOTE.—"Giving some effect to repugnant clauses." Code La., § 1940; *Ward vs. Whitney*, 8 N. Y., p. 446. But it must "subordinate to the general intent of the whole contract."—*Casler vs. Conn. Ins. Co.*, 22 N. Y.,

p. 425; see *Harper vs. N. Y. City Ins. Co.*, id., p. 441; see *Saunders vs. Clark*, 29 Cal., p. 299.

Inconsistent words rejected.

1653. Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.

NOTE.—“Words inconsistent with its nature.”—*Mills vs. Wright*, 1 Freem., p. 247; *Simpson vs. Vaughan*, 2 Atk., p. 32; *Vernon vs. Alsop*, T. Raym., p. 68; *Story Cont.*, Secs. 635, 636, 660; *Stockton vs. Turner*, 7 J. J. Marsh, p. 192; see *Buck vs. Burk*, 18 N. Y., p. 337. “Or with the intention of the parties.”—*Dallman vs. King*, 4 Bing. N. C., p. 105; see *Rex vs. Erminster*, 6 Ad. & El., p. 598.

Words to be taken most strongly against whom.

1654. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

NOTE.—“Not removed by the preceding rules.” This rule is to be resorted to only when all others fail.—*Hargreave vs. Smee*, 6 Bing., p. 244; *Chit. Cont.* (4th ed.), p. 95; see *Browning vs. Wright*, 2 Bos. & Pul., p. 22; *Barton vs. Fitzgerald*, 15 East., p. 546. “Against the party causing the uncertainty.”—*Code La.*, §§ 1952, 1953; see *Harper vs. N. Y. City Ins. Co.*, 22 N. Y., p. 441; *Marvin vs. Stone*, 2 Cow., p. 781. For the proper limits to the use of the word “ambiguity,” see *Ashworth vs. Mounsey*, 9 Exch., p. 186. “Promisor presumed to be such party.”—See *Rindge vs. Judson*, 24 N. Y., p. 64; *Braunstein vs. Accidental Death Ins. Co.*, 1 Best & Smith, pp. 782, 799; *Richards vs. Warring*, 39 Barb., p. 42. “Contracts between public officers and private persons.”—*Stourbridge Canal Co. vs. Wheeley*, 2 B. & Ad., p. 792; *Priestley vs. Foulds*, 2 Man. & Gr., p. 194; *Jackson vs. Reeves*, 3 Caines, pp. 293, 303; *Blakemore vs. Glamorgan Canal Co.*, 1 Myl. & K., pp. 154, 162; *Hull Dock Co. vs. La Marche*, 8 B. & C., pp. 42, 52; *Leeds & Liv. Canal Co. vs. Hustler*, 1 id., p. 424; *Parker vs. Gt. Western Railw. Co.*, 7 M. & G., pp. 253, 288; *Barrett vs. Stockton*, etc.,

Railw. Co., 2 id., p. 134; *Gildart vs. Gladstone*, 11 East., pp. 675, 685; see *Mohawk Bridge Co. vs. Utica & Schen. R. R. Co.*, 6 Paige, p. 554.

1655. Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.

Reasonable stipulations, when implied.

NOTE.—“Stipulations implied to make a contract reasonable.”—*Jones vs. Gibbons*, 8 Exch., p. 922; *Buck vs. Burk*, 18 N. Y., p. 337; see *Thomas vs. Fleury*, 26 N. Y., p. 26. “Or conformable to usage.”—*Field vs. Lelean*, 6 H. & N., p. 617; *Pollock vs. Stables*, 12 Q. B., p. 765; *Bayliffe vs. Butterworth*, 1 Exch., p. 425; *Syers vs. Jonas*, 2 id., p. 116; *Hutton vs. Warren*, 1 M. & W., p. 475; *Humfrey vs. Dale*, 7 E. & B., p. 266; *Dale vs. Humfrey*, El. B. & El., p. 1004; *Brown vs. Byrne*, 3 E. & B., p. 703. “Where no contrary intention is manifested.”—*Mutual Ins. Co. vs. Hone*, 2 N. Y., p. 241; *Vail vs. Rice*, 5 id., p. 155; *Hutton vs. Warren*, 1 M. & W., p. 475; see *Suse vs. Pompe*, 8 C. B. (N. S.), p. 538. A stipulation which is clearly in accordance with the intention of the parties must be enforced, though ever so unreasonable.—*Stadhard vs. Lee*, 3 Best & Sm., p. 364. A stipulation which cannot be misunderstood—e. g., for the payment of a certain sum of money—cannot be modified by proof of a usage to accept a smaller sum in satisfaction.—*St. Nicholas Ins. Co. vs. Mercantile Ins. Co.*, 5 Bosw., p. 246. See note to Secs. 1643, ante, and 1625.

1656. All things that, in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

Necessary incidents implied.

NOTE.—“Things necessary implied therefrom.”—Code Napoleon, § 1160; *Lampman vs. Milks*, 21 N. Y., p. 505; *Huttemeier vs. Albro*, 18 id., p. 48; *Kelsey vs. Durkee*, 33 Barb., p. 410. “Some being mentioned, others of the same class excluded.”—*Co. Litt.*, p. 210a; *Hare vs. Horton*, 5 B. & Ad., p. 715; *Rex vs. Sedgley*, 2 id., p. 65; *Line vs. Stephenson*, 4 Bing. N. C., p. 678; 5 id., p. 183; *Cook vs. Jennings*, 7 T. R., p. 381.

Time of
perform-
ance of
contract.

1657. If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained.

NOTE.—“No time being specified, a reasonable time allowed.”—*Atwood vs. Emery*, 1 C. B. (N. S.), p. 110; *Hoggins vs. Gordon*, 3 Q. B., p. 466; *Sansom vs. Rhodes*, 6 Bing. N. C., p. 261; 8 Scott, p. 244; *Stavart vs. Eastwood*, 11 M. & W., p. 197; see *Thomas vs. Dickinson*, 12 N. Y., p. 369; *Terwilliger vs. Knapp*, 2 E. D. Smith, p. 86. No more than a reasonable time is allowed.—See *Cross vs. Beard*, 26 N. Y., p. 85. “When capable of being performed instantly.”—*Van Boskerck vs. Mott*, N. Y. Sup. Ct., 1864; *Des Arts vs. Leggett*, 16 N. Y., p. 588. “Payment of money.” *Lake Ontario R. R. vs. Mason*, 16 N. Y., p. 451; *Purdy vs. Philips*, 11 N. Y., p. 406; *Wright vs. Whiting*, 40 Barb., p. 235; *Thompson vs. Ketcham*, 8 Johns., p. 189; *Gibbs vs. Southam*, 5 B. & Ad., p. 911. “Immediately upon the thing to be done being exactly ascertained.”—*Penn. Coal Co. vs. Del. and Hudson Canal Co.*, 29 Barb., p. 589; affirmed in Court of Appeals.

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Time, when
of essence.

1658. Time is never considered as of the essence of a contract, unless by its terms expressly so provided.

NOTE.—This provision is new. The law heretofore upon the subject is involved in so much difficulty that it seems best to adopt this more stringent rule. See *Story Eq. Jur.* (Redfield's ed.), Sec. 776, and notes; also, Secs. 777, and 777a, and notes and cases cited.

When joint
and several

1659. Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.

NOTE.—In cases of a joint note given upon a joint loan of money, or a joint liability of any kind, it will be presumed it was intended that the note should be several as well as joint; and effect will be given according to that intention.—*Yorks vs. Peck*, 14 Barb., p. 644. But where one maker (deceased) was a mere

surety, such a presumption will not be indulged. The responsibility will not, in such a case, be extended, without proof of an express agreement.—Id.; see, also, *Hunt vs. Rousmanier*, 8 Wheat., p. 164.

1660. A promise, made in the singular number, Same. but executed by several persons, is presumed to be joint and several.

NOTE.—*Van Alstyne vs. Van. Slyck*, 10 Barb., p. 383. A promissory note, "I promise to pay," in due form, signed by two persons; held to be a joint and several note.—*Hemmenway vs. Stone*, 7 Mass., p. 58.

1661. An executed contract is one, the object of which is fully performed. All others are executory. Executed and executory contracts, what.

NOTE.—An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.—*Fletcher vs. Peck*, 6 Cranch, p. 136.

TITLE IV.

UNLAWFUL CONTRACTS.

SECTION 1667. What is unlawful.

- 1668. Certain contracts unlawful.
- 1669. Penalties void.
- 1670. Contract fixing damages, void.
- 1671. Exception.
- 1672. Restraints upon legal proceedings.
- 1673. Contract in restraint of trade, void.
- 1674. Exception in favor of sale of good will.
- 1675. Exception in favor of partnership arrangements.
- 1676. Contract in restraint of marriage, void.

1667. That is not lawful which is:

- 1. Contrary to an express provision of law;

What is unlawful.

Same.

2. Contrary to the policy of express law, though not expressly prohibited; or,
3. Otherwise contrary to good morals.

NOTE.—*Subd. 1.*—The law makes no distinction in this respect between *malum prohibitum* and *malum in se*.—Pennington vs. Townsend, 7 Wend., p. 276; Leavitt vs. Palmer, 3 N. Y., p. 19; De Groot vs. Van Duzer, 20 Wend., p. 390; Pratt vs. Adams, 7 Paige, p. 653; Seneca Co. Bk. vs. Lamb, p. 26 Barb., p. 595.

Subd. 2.—Bell vs. Leggett, 7 N. Y., pp. 176, 181; Gray vs. Hook, 4 N. Y., p. 449. There is no difference in principle between a contract to keep a witness for the Government out of the way and an agreement to suppress and get from the archives or offices of the Government a deposition, a knowledge of which may be important to the Government, and such contracts would be void as against public policy.—Valentine vs. Stewart, 15 Cal., p. 387. Any agreement as to Government contracts which tends to deprive the Government of the advantage of competition in the bidding is void.—Swan vs. Chorpenning, 20 Cal., p. 182. A contract by a public officer, which interferes with the unbiased discharge of his duty, is void.—See Spence vs. Harvey, 22 Cal., p. 336.

Subd. 3.—Lady Cox's Case, 3 Peere Wms., p. 339; Walker vs. Perkins, 3 Burr., p. 1568; Gray vs. Matthias, 5 Ves., p. 291; see Trovinger vs. McBurney, 5 Cow., p. 253; Wait vs. Day, 4 Den., p. 446. The law does not avoid acts merely dishonorable or discreditable.—Moore vs. Remington, 34 Barb., p. 427.

Certain
contracts
unlawful.

1668. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

NOTE.—See Smith vs. N. Y. Central R. R., 24 N. Y., p. 222; Perkins vs. Same, id., p. 213. Where A was employed to superintend building a structure of which he was one of the contractors; *held*, that it was not competent to plead that it was against public policy that he should occupy two positions, of which the interests were in conflict, as a defense to an action brought by him for services as superintendent.—Shaw vs. Andrews, 9 Cal., p. 78. An agreement between a judgment creditor and one claiming an interest in the thing about

to be sold, under an execution against a third person, that neither shall bid against the other, but that the claimant may and shall buy in the property, is void as against public policy.—Packard vs. Bird, 40 Cal., p. 378.

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1669. Penalties imposed by contract for any non-performance thereof, are void. But this section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used; it merely rejects and avoids the penal clauses.

Penalties
void.

NOTE.—A sum specifically named in a written agreement “as liquidated damages,” in case either party should fail to perform the contract, must nevertheless be construed as a penalty where, upon the face of the instrument, it appears that such a sum will necessarily be an inadequate compensation for the breach of some of the provisions, and more than enough for the breach of others.—Lampman vs. Cochran, 16 N. Y., p. 275. See Dennis vs. Cummins, 3 Johns. Cas., p. 297; Spear vs. Smith, 1 Den., p. 464; Richards vs. Edick, 17 Barb., p. 260; Mills vs. Fox, 4 E. D. Smith, p. 220; Beale vs. Hayes, 5 Sandf., p. 640.

1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

Contract
fixing dam-
ages, void.

1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

Exception.

NOTE.—Where S sold to R his butcher shop, tools, etc., at Suisun, and in his contract of sale entered into this covenant with R: “I also bind myself, in the sum of five hundred dollars, to said R, not to go into the butchering business in said Suisun without the consent of said R, in any manner whatever,” it was held that the five hundred dollars mentioned in the covenant were to be regarded as “liquidated damages,” and not as a penalty.—Streeter vs. Rush, 25 Cal., p. 67. See, also, Cal. Steam Nav. Co. vs. Wright, 6 Cal., p. 258, and

Fish vs. Fowler, 10 Cal., p. 512. The use of the phrase "liquidated damages" leads frequently to an evasion of the law in respect to penalties. The Courts, not venturing to declare such contracts void, constantly discourage them. They are oppressive and unconscientious, except in the cases permitted above, and ought not to be allowed. The restrictions imposed by this section are, however, new. See *Bagley vs. Peddie*, 16 N. Y., p. 469. See, also, cases cited in note to Sec. 1668.

Restraints
upon legal
proceed-
ings.

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1672. Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

NOTE.—The first part of this section is acknowledged law. A covenant in a contract, not to sue for a breach thereof, is void. The latter provision is new. The question involved has been variously decided in different tribunals, with a preponderance of opinion in favor of the right to limit the time of commencing actions, as a matter of law, but with frequent disapprobation of the practice. In support of the right, see *Fullam vs. New York Insurance Co.*, 7 Gray, p. 6; *Brown vs. Roger Williams Insurance Co.*, 5 R. I., p. 394; *Northwestern Insurance Co. vs. Phoenix O. & C. Co.*, 31 Penn. St., p. 448; *Portage Insurance Co. vs. West*, 6 Ohio St., p. 599; *Wilson vs. Aetna Insurance Co.*, 27 Verm., p. 99; also, *Ames vs. New York Insurance Co.*, 14 N. Y., p. 266. Against it, see *Eagle Insurance Co. vs. Lafayette Insurance Co.*, 9 Ind., p. 443; *French vs. Lafayette Ins. Co.*, 5 McLean, p. 461. The law itself, and the law alone, should regulate the limitations of actions.

Contract in
restraint of
trade. void.

1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

NOTE.—Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. In *Dunlop vs. Gregory*, 10 N. Y., p. 241, a contract not to run a certain steamboat above Saugerties,

on the Hudson, was enforced, although there was no sale of a good will, nor any circumstance to justify the contract, except that it was made upon a sale of a vessel by an association of persons who had previously used it to run above Saugerties, and wished to avoid competition. In the case of *Cal. Steam. Nav. Co. vs. Wright*, 6 Cal., p. 258, it was held that a contract not to run boats on a certain line of travel was not void, as being against public policy and in restraint of trade, when a consideration was paid therefor. In such a case the doctrine was said to be that there must not only be a consideration for the contract, but there must be some good reason for entering into it; and it must impose no restraint upon one party which is not beneficial to the other. It was held that such a contract gave no monopoly, giving an exclusive enjoyment of the business only as against a single individual, while all the world beside was left at full liberty to enter upon the same enterprise. Yet this is a contract restraining an individual from exercising a lawful trade. By the terms of this section, and by the following section, the restraint imposed would seem to be obliged to be limited to a specified county; and to this effect, also, are the cases of *Wright vs. Ryder*, 36 Cal., p. 342, and *Moore vs. Bonnet*, 40 Cal., p. 251. In *Whittaker vs. Howe*, 3 Beav., p. 387, a contract not to practice law anywhere in England was specifically enforced. Such a contract manifestly tends to enforce idleness, and deprives the State of the services of its citizens.

1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

Exception
in favor of
sale of good
will.

NOTE.—The district within which a party may exclude himself from carrying on business should be accurately defined by law. And no one should be allowed to prevent another from carrying on a business unless he himself provides the public with the same advantages in the same county or city, or part thereof.—*Moore vs. Bonnet*, 40 Cal., p. 251; *Wright vs. Ryder*, 36 Cal., p. 342.

1675. Partners may, upon or in anticipation of a

Exception
in favor of
partnership
arrange-
ments.

dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.

NOTE.—An agreement of this description, operating equally upon all the partners, gives to all an opportunity to start anew in business upon equal terms. In such cases, an agreement excluding them all from the county would have been too broad. It may even be doubted whether “ward” should not have been substituted for “city” in the text.

Contract in
restraint of
marriage,
void.

1676. Every contract in restraint of the marriage of any person, other than a minor, is void.

NOTE.—Contracts in general restraint of marriage are certainly void.—*Lowe vs. Peers*, 4 Burr, 2225; *Hartley vs. Rice*, 10 East., p. 22; *Baker vs. White*, 2 Verm., p. 215; *Sterling vs. Sinnickson*, 2 South., p. 756; see *Conrad vs. Williams*, 6 Hill, p. 444. Perhaps a contract simply in restraint of remarriage of the wife of one of the parties would heretofore have been held valid in analogy to the rule concerning wills, but experience has shown that such stipulations tend to immorality. Restraints upon the marriage of minors are perhaps sometimes promotive of prudence, without being burdensome. For a discussion of this subject see note to Sec. 710, ante.

TITLE V.

EXTINCTION OF CONTRACTS.

CHAPTER I. *Contracts, how Extinguished.*

II. *Rescission.*

III. *Alteration and Cancellation.*

CHAPTER I.

CONTRACTS, HOW EXTINGUISHED.

SECTION 1682. Contract, how extinguished.

1682. A contract may be extinguished in like manner with any other obligation, and also in the manner prescribed by this Title.

Contract,
how extin-
guished.

NOTE.—See Title IV of Part I of this Division.

CHAPTER II.

RESCISSION.

SECTION 1688. Rescission extinguishes contract.

1689. When party may rescind.

1690. When stipulations against right to rescind do not defeat it.

1691. Rescission, how effected.

1688. A contract is extinguished by its rescission.

Rescission
extin-
guishes
contract.

NOTE.—An offer to return a deed does not revert the grantor with the title, nor is it a rescission, or offer of rescission of the contract.—Ahrens vs. Adler, 33 Cal., p. 608. See Article on Rescission, as adjudged by way of specific relief, Secs. 3406, 3407, and 3408, post.

1689. A party to a contract may rescind the same in the following cases only:

When
party may
rescind.

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;

2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part;

3. If such consideration becomes entirely void from any cause;

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,

5. By consent of all the other parties.

NOTE.—Subd. 1.—"If consent of the party rescinding, or of any party jointly contracting with him." It is of no importance whether the false representations were made to both the parties jointly contracting, or only one of them. A joint contract to pay money by two individuals, obtained by a fraud practiced upon one of them, is void as to both. Even where the contract is several, as well as joint, still, if one is compelled to pay the whole, he has his remedy against the other for contribution, and if deprived of this remedy through the fraud of the opposite party, he cannot be holden.—*City Bank of Columbus vs. Bruce*, 17 N. Y., p. 514.

Subd. 2.—"If, through the fault of the party as to whom he rescinds."—See *Sherman vs. White*, How. App. Cas., p. 29; *Winter vs. Livingston*, 13 Johns., p. 54. A party cannot rescind a contract on account of an obstacle to its completion caused by his own fault.—*Salmon vs. Hoffman*, 2 Cal., p. 138; see *Alvarez vs. Brannan*, 7 Cal., p. 503. "The consideration fails in whole or in part."—*Petry vs. Christy*, 19 Johns., p. 53; see *Duncan vs. Edgerton*, 6 Bosw., p. 36; *Morange vs. Morris*, 34 Barb., p. 311.

Subd. 3.—"If such consideration becomes entirely void."—See *Harmon vs. Bird*, 22 Wend., p. 113. Where there was a sale of an improvement on a thrashing machine, and a note given for the payment thereof; held, that subsequent improvements which rendered the former improvement useless, did not impeach the consideration of the note. The purchasers took the risk of any new discovery which should destroy the value of their property. "From any cause."—*Head vs. Stevens*, 19 Wend., p. 411; *Cross vs. Huntley*, 13 id., p. 386; *Putnam vs. Westcott*, 19 Johns., p. 73; *Tappen vs. Van Wagener*, 3 Johns., p. 465.

Subd. 4.—Where, upon an executory contract for the delivery of goods sold for payment upon such delivery in the notes of a third party who becomes insolvent between the time of the contract and that stipulated for its performance, the seller is not bound to deliver upon a tender of the notes of such third party, even though they are not entirely worthless.—*Benedict vs. Field*, 16 N. Y., p. 595. Perhaps this rule has heretofore been confined to executory contracts.—See *Des Arts vs. Leggett*, 16 N. Y., pp. 582, 589.

Subd. 5.—*James vs. Cotton*, 7 Bing., p. 266. Such consent is implied from a refusal or disability on the part of the other party to perform on his part.—*Withers vs. Reynolds*, 2 B. & Ad., p. 882; see *Fletcher vs.*

Button, 4 N. Y., p. 396; Lawrence vs. Taylor, 5 Hill, p. 107; Van Benthuyssen vs. Crasper, 8 Johns., p. 257; Prickett vs. Badger, 1 C. B. (N. S.), p. 296; De Bernardy vs. Harding, 8 Exch., p. 822; see, also, Frothingham vs. Jenkins, 1 Cal., p. 42.

1690. A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation.

When stipulations against right to rescind do not defeat it.

NOTE.—Robinson vs. Musgrave, 8 Carr. & P., p. 469; Dobell vs. Hutchinson, 3 Ad. & El., p. 355; Sherwood vs. Robbins, 3 Carr. & P., p. 339.

1691. Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

Rescission, how effected.

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

NOTE.—“Reasonable diligence.”—Ladd vs. Moore, 3 Sandf., p. 589.

Subd. 1.—“Must rescind promptly.”—Fratt vs. Fiske & Loring, 17 Cal., p. 380; Fisher vs. Fredenhall, 21 Barb., p. 82; Wheaton vs. Baker, 14 id., p. 597; M'Carty vs. Ely, 4 E. D. Smith, p. 375; Rosenbaum vs. Gunter, 3 id., p. 203; Masson vs. Bovet, 1 Denio, p. 73; Milner vs. Tucker, 1 Carr. & P., p. 15; see Sweetman vs. Prince, 26 N. Y., p. 224. This is undoubtedly the common law rule. But the rule in equity does not appear to have been so strict. The equitable action for rescission is governed by rules stated in the Fourth Division of this Code. “Upon

discovering the facts which entitle him to rescind."—So long as he is ignorant of any fact material to his right to rescind, the lapse of time is immaterial.—*Wall vs. Cockerell*, 10 H. of L. Cas., p. 229; and see cases above. "If he is free from duress, menace, or undue influence, or disability, and is aware of his right to rescind."—So long as the undue influence, menace, etc., lasts, the lapse of time is not regarded.—*Sharp vs. Leach*, 8 Jur. (N. S.) p. 1026; 31 Beav., p. 491. And this is also the case where the party is not aware of his right to rescind.—*Wood vs. Downes*, 18 Ves., p. 123; *Crowe vs. Ballard*, 3 Bro. C. C., p. 120; 1 Ves., p. 214; 2 Cox, p. 253; *Gowland vs. De Faria*, 17 Ves., p. 20; *Morse vs. Royal*, 12 id., p. 374; *Roche vs. O'Brien*, 1 Ball & B., pp. 338, 353; *Dunbar vs. Tredennick*, 2 id., p. 316.

Subd. 2.—"Must restore to the other party everything."—*Miller vs. Steen*, 30 Cal., p. 402; *Goelth vs. White*, 35 Barb., p. 76; *Stevens vs. Hyde*, 32 Barb., p. 171; *Fisher vs. Fredenhall*, 21 Barb., p. 82; *Wheaton vs. Baker*, 14 id., p. 600; *Matteawan Co. vs. Bentley*, 13 id., p. 641; *Clarke vs. Dickson*, El. Bl. & E., p. 148; *Beed vs. Blandford*, 2 You. & J., p. 278; *Hunt vs. Silk*, 5 East, p. 449; *Fisher vs. Conant*, 3 E. D. Smith, p. 199; see *Nichols vs. Michael*, 23 N. Y., p. 272. "Of value."—The note of the adverse party, if not negotiated, is valueless, and need not be restored to him. *Nichols vs. Michael*, 23 N. Y., pp. 267, 273; *Fraschieris vs. Henriques*, 36 Barb., p. 276; *Nellis vs. Bradley*, 1 Sandf., p. 560; and so is the note of an insolvent third person.—*Hawkins vs. Appleby*, 2 Sandf., p. 421. "Received under the contract."—*Colville vs. Besly*, 2 Denio, p. 139. "Offer to restore."—*Thornton vs. Wynn*, 12 Wheat., p. 193; *Sandford vs. Travers*, 7 Bosw., p. 498; *Baker vs. Robbins*, 2 Denio, p. 136; *Hogan vs. Weyer*, 5 Hill, p. 389. "Unless the latter is unable."—*Masson vs. Bovet*, 1 Denio, p. 69; *Ladd vs. Moore*, 3 Sandf., p. 589. He must rescind the contract *in toto*, and thus place the party in the position he was in before the sale.—*Wheaton vs. Baker*, 14 Barb., p. 594, and cases cited; see *Miller vs. Steen*, 30 Cal., p. 402.

A rescission of the contract may be granted upon the allegation of insolvency of the grantor, and his inability to respond in damages to an action upon the covenant, a permanent outstanding title in another, and an offer to redeliver possession and account for the rents and profits.—*Norton vs. Jackson*, 5 Cal., p. 262. It was held that where a party seeks the rescission of an exe-

cuted contract for the sale of land on the ground of a false suggestion, it must appear that the misrepresentation complained of was as to a material fact by which the party was induced to make the contract to his injury, and in relation to which he placed confidence in the other by reason of his not having the means of knowledge within his own reach. A naked misrepresentation, or a suppression of facts, however wrong in point of morals, unaccompanied by actual damage, does not afford ground for the rescission of such executed contract.—Board of Commissioners F. D. S. J. vs. Younger, 29 Cal., p. 172; Morrison vs. Lods, 39 Cal., p. 381. Misrepresentation of value of good will of business as ground for rescission.—See Cruess vs. Fessler, 39 Cal., p. 336. A party seeking to rescind a contract must restore the other party to the condition in which he was before the contract was made.—Watts vs. White, 13 Cal., p. 321. Where the parties cannot be thus restored to their original position, the right of rescission cannot exist—State of California vs. McCauley, 15 Cal., p. 429; Fratt vs. Fiske & Loring, 17 Cal., p. 380; Board of Com. F. D. S. J. vs. Younger, 29 Cal., p. 172. Morrison vs. Lods, 39 Cal., p. 381. W entered into a contract with S for the purchase from him of land for twenty-five thousand dollars—four thousand dollars cash, ten thousand five hundred dollars in October, remainder in a year thereafter. The cash payment was made, and W took and held possession for nearly a year. The parties then indorsed on the contract this agreement, viz: "For value received, we hereby *cancel* the annexed and within agreement, and mutually agree and discharge each other from all the covenants and agreements therein contained; and the said W, the purchaser, hereby surrenders possession of the within described premises to the said S." *Held*: that W cannot recover the four thousand dollars paid; that the word "cancel," as used, is not equivalent to rescind, and that as nothing is said in the agreement about putting the parties in statu quo and refunding the four thousand dollars, the true construction is that the parties meant to exclude what they did not directly express.—Winton vs. Spring, 18 Cal., p. 451. If a vendor, upon default, was entitled at his option either to rescind the contract or retake the property and hold it as security, and he does retake the property without rescinding, he may have it sold, in a proper proceeding, to pay the balance of purchase money due.—See facts of the case, Miller vs. Steen, 30 Cal., p. 402. But in such a case the vendee, before the sale, might have

tendered or paid the full amount due, and would thereby have become entitled to the property.—Id.

CHAPTER III.

ALTERATION AND CANCELLATION.

SECTION 1697. Alteration by consent.

1698. Sealed contracts, how modified.

1699. Extinction by cancellation, etc.

1700. Extinction by unauthorized alteration.

1701. Alteration of duplicate, not to prejudice.

Alteration
by consent.

Am 1697. A contract may be altered in any respect by consent of the parties, without a new consideration, and is extinguished thereby to the extent of the alteration.

NOTE.—Alterations generally, but not always, consist in the substitution of a new contract for the one that is superseded. Such an alteration is a novation, and is considered under that head. A consideration is necessary to make an alteration valid at common law. A novation implies a consideration, but an alteration of any other kind amounts only to a partial release without seal. See the Chapter on Release. Even a mere extension of the time for performance requires a consideration to support it.—*Kellogg vs. Olmstead*, 25 N. Y., p. 189; affirming S. C., 28 Barb., p. 96.

Sealed
contracts,
how
modified.

Am 1698. A contract in writing may be altered by a contract in writing, or by an executed oral agreement; and not otherwise, except as to the time of performance, which may be extended by any form of agreement.

NOTE.—It has been held that a contract under seal could only be altered by an agreement under seal.—*Allen vs. Jaquish*, 21 Wend., p. 628; *Delacroix vs. Bulkley*, 13 id., p. 71. The propriety of this restriction is questionable, inasmuch as it is a pure technicality, which is and must be unfamiliar to ordinary business men. An alteration in writing, or an oral agreement, answers every purpose of justice. See, also, *Pierrepoint vs. Barnard*, 6 N. Y., p. 279; *Flynn vs. McKeon*, 6 Duer, p. 203; *Clark vs. Dales*, 20 Barb.,

p. 42; *Stone vs. Sprague*, id., p. 509; *Esmond vs. Van Benschoten*, 12 Barb., p. 366; *Fleming vs. Gilbert*, 3 Johns., p. 528. As to modification and alteration of contracts generally, see *De Broom vs. Priestly*, 1 Cal., p. 206; *Mowry vs. Starbuck*, 4 Cal., p. 274; *Smith vs. Truebody*, 2 Cal., p. 341; *Reynolds vs. Jourdan*, 6 Cal., p. 108; *Kalkmann vs. Baylis*, 17 Cal., p. 291; *McFadden vs. O'Donald*, 18 Cal., p. 160; and as to modification or alteration of a written contract by verbal agreement, see *McFadden vs. O'Donald*, 18 Cal., p. 160; *Whiting vs. Hoslep*, 4 Cal., p. 327; *McDonald vs. M. L. W. Co.*, 4 Cal., p. 335.

1699. The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act.

Extinction
by cancel-
lation, etc.

NOTE.—See *Gardner vs. Gardner* (Ct. of Errors), 22 Wend., p. 526. Facts excusing compliance with contract, see *Plate vs. Vega*, 31 Cal., p. 383. A draft was given for purchase money under a contract that the vendor should keep the goods ninety days and then deliver them upon the payment of the entire price, less the draft, and before the time expired the purchaser notified the vendor that he could not comply with the contract, but would pay the draft, the vendor was held excused from keeping the goods.—Id. See, also, note to Sec. 1691, case of *Winton vs. Spring*, 18 Cal., p. 451.

1700. The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.

Extinction
by unauthor-
ized
alteration.

NOTE.—“The intentional.” An accidental alteration or destruction does not prejudice.—See *Skip vs. Huey*, 3 Atk., p. 93; *Hornby vs. Matcham*, 16 Sim., p. 325; *Des Arts vs. Leggett*, 16 N. Y., p. 582. Thus, where a creditor traced ink over the debtor's name which had become blotted and obscured, and in so doing misspelled it by mistake, this was held immaterial.—*Dunn vs. Clements*, 7 Jones Law, N. C., p. 58. “Destruction.”—*Blade vs. Noland*, 12 Wend., p. 173; see *Hinsdale vs. Bank of Orange*, 6 id., p. 378. “Can-

cellation or material alteration."—*Chappell vs. Spencer*, 23 Barb., p. 584; *Bruce vs. Westcott*, 3 id., p. 374; *Waring vs. Smyth*, 2 Barb. Ch., p. 119; *Nazro vs. Fuller*, 24 Wend., p. 374; *Maybee vs. Sniffen*, 2 E. D. Smith, p. 1; *Fay vs. Smith*, 1 Allen, p. 477; *Burchfield vs. Moore*, 3 El. & Bl., p. 683; *Warrington vs. Early*, 2 id., p. 763; *Cowie vs. Halsall*, 4 B. & Ald., p. 197. An alteration which cannot possibly be material, does not vitiate.—*People vs. Muzzy*, 1 Denio, p. 239; *Pequawket Bridge Co. vs. Mathes*, 8 N. H., p. 139; *Nichols vs. Johnson*, 10 Conn., p. 192; *Smith vs. Crooker*, 5 Mass., p. 540; *Langdon vs. Paul*, 20 Verm., p. 217. "By a party entitled to any benefit under it." An alteration by a stranger does not affect the contract.—*Rees vs. Overbaugh*, 6 Cow., p. 746; see *Malin vs. Malin*, 1 Wend., p. 659. And where an alteration was made in the presence of the creditors, by an agent of the debtor, who believed that he had authority to make it, but in fact had not, it was held that the contract was not avoided thereby.—*Van Brunt vs. Eoff*, 35 Barb., p. 501. "Or with his consent." Consent is equivalent to an alteration by the party himself.—See *Martin vs. Thomas*, 24 How. U. S., p. 315; *Waring vs. Smyth*, 2 Barb. Ch., p. 119. "Extinguishes all." The whole contract is extinguished by a material alteration, however slight. See cases cited above. "The executory." An alteration does not divest an interest that has vested under a grant.—*Smith vs. McGowan*, 3 Barb., p. 404; *Lewis vs. Payn*, 8 Cow., p. 71; *Chessman vs. Whittemore*, 23 Pick., p. 231; *Withers vs. Atkinson*, 1 Watts, p. 236; *Barrett vs. Thorndike*, 1 Greenl., p. 73. "Obligations of the contract." It seems to be doubtful whether the payee of a note, who has lost his rights under it by an alteration, can recover upon the original consideration.—*Clute vs. Small*, 17 Wend., p. 237. It has been held that he may.—*Atkinson vs. Hawdon*, 2 Ad. & El., p. 628; but compare *Alderson vs. Langdale*, 3 B. & Ad., p. 660. It should seem that he ought not, for the note undoubtedly suspends the time of payment of the original debt until the note becomes due (*Hart vs. Hudson*, 6 Duer, p. 294), and under such circumstances the note would never become due. But where a note is altered by consent, and is void for want of a new stamp, the original debt may be recovered.—*Sutton vs. Toomer*, 7 B. & Cr., p. 416. "In his favor." Where there are two creditors having separate interests under a contract, an alteration by one of them does not prejudice the rights of the other. "Against the parties who do

not consent to the act." An alteration does not discharge parties consenting thereto (*Sanderson vs. Symonds*, 1 Brod. & B., p. 426; *Coke vs. Brummell*, 8 Taunt., p. 439), even though other parties jointly and severally liable with them are thereby discharged.—*Prettyman vs. Goodrich*, 23 Ill., p. 330; *Downes vs. Richardson*, 5 B. & Ald., p. 674. If their obligations were purely joint, the result might be different.

1701. Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section.

Alteration
of
duplicate,
not to
prejudice.

NOTE.—*Lewis vs. Payn*, 8 Cow., p. 71; same case, 4 Wend., p. 426.

PART III.

OBLIGATIONS IMPOSED BY LAW.

SECTION 1708. Abstinence from injury.

1709. Fraudulent deceit.

1710. Deceit, what.

1711. Deceit upon the public, etc.

1712. Restoration of thing wrongfully acquired.

1713. When demand necessary.

1714. Responsibility for willful acts, negligence, etc.

1715. Other obligations.

1708. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.

Abstinence
from
injury.

NOTE.—These rights are defined by the First and Second Divisions of this Code.

1709. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

Fraudu-
lent deceit.

NOTE.—“With intent.” An *intent* to defraud is an essential element of actual fraud—*Thomas vs. Beebe*, 25 N. Y., p. 250; *Zabriskie vs. Smith*, 13 id., p. 322; *Addington vs. Allen*, 11 Wend., p. 374; *Behn vs. Kemble*, 7 C. B. (N. S.), p. 260; *Young vs. Covell*, 8 Johns., p. 23; *Cropsey vs. Robinson*, 5 N. Y. Leg. Obs., p. 20; *People vs. Kelly*, 35 Barb., p. 444. “To his injury.” It is immaterial whether the party committing the fraud receives the benefit of it, or does it for the profit of another (*Addington vs. Allen*, 11 Wend., p. 374; *Zabriskie vs. Smith*, 13 N. Y., p. 322); or whether any person gains an advantage thereby, or not. *Injury*, not *gain*, is the essential element of fraud.—*White vs. Merritt*, 7 N. Y., p. 352. “Or risk.” *Polhill vs. Walter*, 3 Barn. & Ad., p. 114; *Corbett vs. Brown*, 8 Bing., p. 33. In these cases the fraud was

committed in the belief that no actual injury would ensue. "Liable for the damage he suffers thereby." The law takes no cognizance of a fraud which does not in fact work some injury.—*People vs. Cook*, 8 N. Y., p. 67; *Eastwood vs. Bain*, 3 H. & N., p. 738; see *Hemingway vs. Hamilton*, 4 M. & W., p. 115; *Story Eq. Jur.*, Sec. 203.

Deceit,
what.

1710. A deceit, within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise, made without any intention of performing it.

NOTE.—See note to Sec. 1572, ante, for a full discussion of the subject matter of this section. *Subd. 3.* *Addington vs. Allen*, 7 Wend., p. 20. This subdivision is not the same in form as the corresponding subdivision of Sec. 1572, as that would obviously be too broad in this case.

Deceit
upon the
public, etc.

1711. One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.

NOTE.—It is necessary that the party charged with fraud should have intended to defraud *the party* who was in fact misled (*Van Kleeck vs. Le Roy*, 37 Barb., p. 544; *Seizer vs. Mali*, 32 id., p. 76), or to defraud the public (*Cross vs. Sackett*, 2 Bosw., p. 617; 6 Abb. Pr., p. 247; 16 How. Pr., p. 62; *Cazeaux vs. Mali*, 25 Barb., p. 578; *Newbery vs. Garland*, 31 id., p. 121; *Morse vs. Swits*, 19 How. Pr., p. 275; *Gerhard vs. Bates*, 2 El. & Bl. p. 476), or a class of persons including the party injured.

1712. One who obtains a thing without the con-

sent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

Restoration of thing wrongfully acquired.

NOTE.—“One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded.” This includes duress (*Foshay vs. Ferguson*, 5 Hill, p. 154), menace (see *Eadie vs. Slimmon*, 26 N. Y., p. 9), fraud (*Chester vs. Bank of Kingston*, 16 N. Y., p. 336; *Hennequin vs. Naylor*, 24 id., p. 139; *Nichols vs. Michael*, 23 id., p. 264; *Abbotts vs. Barry*, 2 Brod. & B., p. 369), undue influence (*Sears vs. Shafer*, 6 N. Y., p. 272; *Nottidge vs. Prince*, 2 Giff., p. 246), mistake (*Bank of Commerce vs. Union Bank*, 3 N. Y., p. 230; *Goddard vs. Merchants' Bank*, 4 id., p. 147; *Martin vs. McCormick*, 8 id., p. 331; *Gardner vs. Mayor of Troy*, 26 Barb., p. 423; *Allen vs. Mayor of N. Y.*, 4 E. D. Smith, p. 404; *Gompertz vs. Bartlett*, 2 El. & Bl., p. 849, and cases in which there is a total failure of consideration.—*Eno vs. Woodworth*, 4 N. Y., p. 249; see *Gillet vs. Maynard*, 5 Johns., p. 85; *Collier vs. Coates*, 17 Barb., p. 471). “Or by an unlawful exaction which the owner could not at the time prudently refuse.” It is by no means easy to reconcile all the authorities on this point with each other, or with natural justice. Justice, rather than the decisions, has been followed in the text. The difficulty seems to be that the Courts have established one rule as to the reclamation of money paid, which is simply the rescission of an executed contract, and another as to the rescission of a promise to pay, which is an executory contract. Lord Denman, in *Skeate vs. Beale*, 11 Ad. & El., p. 963, says “the distinction is obvious,” and so it is, but the *principle* of the distinction is not. There is no doubt that fees illegally exacted may be recovered back, although not paid under a mistake of fact.—*American Exch. Fire Ins. Co. vs. Britton*, 8 Bosw., p. 148; *Britton vs. Frink* (Ct. of Appeals), 3 How. Pr., p. 102; *Dew vs. Parsons*, 2 B. & Ald., p. 562; *Steele vs. Williams*, 8 Exch., p. 625; *Townshend vs. Dyckman*, 2 E. D. Smith, p. 227; *Ripley vs. Gelston*, 9 Johns., p. 201; *Frye vs. Lockwood*, 4 Cow., p. 454. Duress of goods is sufficient to

entitle the owner to recover back money paid for their release (*Harmony vs. Bingham*, 12 N. Y., p. 99; *Clinton vs. Strong*, 9 Johns., p. 370; *Oates vs. Hudson*, 6 Exch., p. 346; *Atlee vs. Backhouse*, 3 M. & W., p. 642; *Gibbon vs. Gibbon*, 13 C. B., p. 205; *Ashmole vs. Wainwright*, 2 Q. B., p. 837); and so where a corporation refused to transfer stock upon its books until the stockholder paid an unjust claim (*Bates vs. N. Y. Ins. Co.*, 3 Johns. Cas., p. 238), and where a railway company refused to receive goods until an unlawful charge was paid (*Parker vs. Great Western Railw. Co.*, 7 M. & G., p. 253), the money paid was recovered back. And so it has been held where money was obtained by threat of a penal action (*Unwin vs. Leaper*, 1 M. & G., p. 747), or paid in order to prevent a wrongful sale under execution.—*Wisner vs. Bulkley*, 15 Wend., p. 321. On the other hand, it has been held that money paid under a claim of right, without compulsion or objection (*N. Y. & Harlem R. R. Co. vs. Marsh*, 12 N. Y., p. 308), or even under protest (*Fleetwood vs. City of N. Y.*, 2 Sandf., p. 475; *Sprague vs. Birdsall*, 2 Cow., p. 419), or in mere ignorance of law (*Wilson vs. Ray*, 10 Ad. & El., p. 82), cannot be recovered back. "Unless he has acquired a title thereto superior to that of such other person." This is intended to provide for the exceptions created by the Title on Negotiable Documents, and by Sec. 1142. "Unless the transaction was corrupt and unlawful on both sides."—*Daimouth vs. Bennett*, 15 Barb., p. 541; *Best vs. Strong*, 2 Wend., p. 319; *Burt vs. Place*, 6 Cow., p. 431.

When
demand
necessary.

1713. The restoration required by the last section must be made without demand, except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake.

NOTE.—"Must be made without demand."—*Utica Bank vs. Van Gieson*, 18 Johns., p. 485; see Code La., §§ 2279, 2280; Code Napoleon, §§ 1376, 1377. "Until he has notice of the mistake."—See *Kelly vs. Solari*, 9 M. & W., p. 58.

Responsi-
bility for
willful acts,
negligence,
etc.

1714. Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except

so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

NOTE.—Code La., § 2295; Code Napoleon, § 1383; Austin vs. Hudson River R. R. Co., 25 N. Y., p. 334; Jones vs. Bird, 5 B. & Ald., p. 837; Dodd vs. Holmes, 1 Ad. & El., p. 493. This section modifies the law heretofore existing.—See 20 N. Y., p. 67; 10 M. & W., p. 546; 5 C. B. (N. S.), p. 573. This class of obligations imposed by law seems to be laid down in the case of Baxter vs. Roberts, July Term, 1872, Sup. Ct. Cal. Roberts employed Baxter to perform a service which he (Roberts) knew to be perilous, without giving Baxter any notice of its perilous character; Baxter was injured. *Held:* that Roberts was responsible in damages for the injury which Baxter sustained. (See facts of case.)

1715. Other obligations are prescribed by Divisions I and II of this Code. Other obligations.



PART IV.

OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.

- TITLE I. SALE.
- II. EXCHANGE.
- III. DEPOSIT.
- IV. LOAN.
- V. HIRING.
- VI. SERVICE.
- VII. CARRIAGE.
- VIII. TRUST.
- IX. AGENCY.
- X. PARTNERSHIP.
- XI. INSURANCE.
- XII. INDEMNITY.
- XIII. GUARANTY.
- XIV. LIEN.
- XV. NEGOTIABLE INSTRUMENTS.
- XVI. GENERAL PROVISIONS.

TITLE I.

SALE.

- CHAPTER I. *General Provisions.*
- II. *Rights and Obligations of the Seller.*
- III. *Rights and Obligations of the Buyer.*
- IV. *Sale by Auction.*

CHAPTER I.

GENERAL PROVISIONS.

ARTICLE I. SALE.

II. AGREEMENTS FOR SALE.

III. FORM OF THE CONTRACT.

ARTICLE I.

SALE.

SECTION 1721. Sale, what.

1722. Subject of sale.

Sale, what. 1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property.

NOTE.—A sale is an agreement by which one of the contracting parties, who is called the seller, gives a thing, and passes the title to it, in exchange for a certain price in money, to the other party, called the buyer or purchaser, who on his part agrees to pay the price. The contract of sale differs from that of barter in this, that in the latter the price, instead of being paid in money, is paid in property susceptible of valuation; from accord and satisfaction, because in that contract the thing is given, not for a price, but for the purpose of quieting a claim; and from a gift in this: that a gift is without consideration. To every valid sale there is necessary: 1. Proper parties; 2. A thing which is the object of the contract; 3. A price agreed upon; and, 4. The consent of the contracting parties, and the performance of certain acts required to complete the contract.

Subject of sale.

1722. The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer.

NOTE.—The thing sold must be in existence at the time of the sale. If the sale be of a horse, and the horse has died before the sale, or if of merchandise, and it has been destroyed before the sale, both parties being ignorant thereof, the sale is void. Where a substantial part of the thing sold is non-existent, it seems

to be the rule that the buyer has his option to rescind the sale or to take that which is in existence, with a reasonable abatement of the price.—2 Kent's Com., p. 469; Code Napoleon, Art. 1601. "But," observes Mr. Parsons, in commenting upon this rule (1 Parsons on Contracts, p. 522), "where the parties are equally innocent we think the meaning and effect of this rule is that the buyer should have only his choice between enforcing or rescinding the contract; and if he enforces the contract, and claims the remainder, he should pay for it the price of the whole. For, if the remainder is to be taken at a proportionate reduction, or any reduction from the whole original price, it should be a new bargain. Perhaps, however, he may take the remainder, if he will pay for it the original price, with an abatement which can be made exact by a mere numerical proportion; as where goods were all of one quality, and a certain part was wholly destroyed and the residue left uninjured. But if a new price is to be made for the remainder, by a new estimate of its value, it must be certain that this can be done only by mutual consent." See, also, *Farrer vs. Nightingal*, 2 Esp., p. 639.

ARTICLE II.

AGREEMENTS FOR SALE.

SECTION 1726. Agreement for sale.

1727. Agreement to sell.

1728. Agreement to buy.

1729. Agreement to sell and buy.

1730. What may be the subject of the contract.

1731. Agreement to sell real property.

1732. Form of grant required by such contract.

1733. Usual common law covenants required by such contracts, when.

1734. Form of such covenants.

1726. An agreement for sale is either:

1. An agreement to sell;
2. An agreement to buy; or,
3. A mutual agreement to sell and buy.

Agreement
for sale.

1727. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.

Agreement
to sell.

NOTE.—The distinction between a sale and an agreement to sell is this: that in the former the thing which is the subject of the contract becomes the property of the buyer as soon as the contract is concluded; in the latter the property in the thing remains in the vendor until the contract is executed; in the former one sells to another, in the latter he only promises to sell.

Agreement
to buy.

1728. An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing.

Agreement
to sell and
buy.

1729. An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.

What may
be the
subject of
the
contract.

1730. Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not.

Am

NOTE.—Hale vs. Rawson, 4 C. B. (N. S.), p. 85.

Agreement
to sell real
property.

1731. An agreement to sell real property binds the seller to execute a grant in the form and manner prescribed by the Chapter on Transfers of Real Property.

NOTE.—This provision, in connection with that to which it refers, is intended to provide a uniform mode of transfer. There can be very little question that no more could, even now, be required from the seller. This section will give the buyer a right to insist upon a simple and well known conveyance, if he desires it.

Form of
grant
required
by such
contract.

Reh
1732. An agreement to sell real property binds the seller to execute a grant in the form prescribed by Section 1092.

Usual
common
law
covenants
required
by such
contracts,
when.

1733. An agreement on the part of a seller of real property to give the usual covenants, binds him to insert in the grant covenants of "seizin," "quiet enjoyment," "further assurance," "general warranty," and "against incumbrances."

1734. The covenants mentioned in the last sec-

tion must be in substance as follows: "The party of the first part covenants with the party of the second part, that the former is now seized in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all incumbrances; that the party of the first part, and all persons acquiring any interest in the same through or for him, will, on demand, execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required; and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same."

Form
of such
covenants.

NOTE.—Its object is the same as that of Sec. 1092; namely, to reduce the length of conveyances, and to provide a plain and sufficient form, as is done by the English statute, 8 and 9 Vic., Chap. 119. It is believed that the form here given is sufficient to cover all the intricately worded stipulations usually given in such cases.

ARTICLE III.

FORM OF THE CONTRACT.

SECTION 1739. Contract for sale of personal property.

1740. Contract to manufacture.

am 1741. Contract for sale of real property.

1739. No sale of personal property, or agreement to buy or sell it, for a price of two hundred dollars or more, is valid, unless:

Contract
for sale of
personal
property.

1. A memorandum of the contract, showing the parties, their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged; or,

2. The buyer accepts and receives part of the thing sold, or when it consists of a thing in action, part of the evidences thereof; or,

3. The buyer, at the time of sale, pays a part of the price.

NOTE.—There is some doubt whether a contract binding one to buy, but not binding one to sell, is within the Statute of Frauds. As it ought, upon reason, to stand upon the same footing with the contract to sell, the Commissioners inserted the words “to buy,” in Sec. 1739, thus obviating all doubts upon the subject. At common law a verbal contract for the sale of chattels, for any amount, and however proven, was recognized as valid and binding. This rule of the common law was modified in England by the statute of 29 Chas. II, Chap. 3, familiarly known as the Statute of Frauds, the seventeenth section of which reads as follows: “And be it enacted, that from and after the said four and twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares, or merchandise for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” The English statute, with slight modifications, constitutes the rule in America, and the adjudications upon the leading features of it furnish the light by which corresponding provisions of the Code are to be read.

PERSONAL PROPERTY.—It will be observed that the phrase “personal property” has been substituted for the words “goods, wares, and merchandise” of the English statute, and the words “goods, chattels, or things in action” of our statute. (Stats. 1850, p. 266, Sec. 13.) Under the English statute, and similar American statutes, it has been a controverted point as to what property came within the meaning of the words quoted. (Hilliard on Sales, pp. 464-467; Benjamin on Sales, p. 68; Story on Sales, Secs. 262, 263.) To avoid the question, the Commissioners substituted the phrase “personal property,” which is defined in Subd. 6 of Sec. 14 of this Code.

FOR THE PRICE OF TWO HUNDRED DOLLARS OR MORE.—In *Baldehy vs. Parker*, 2 B. & C., p. 37, the plaintiffs were linen drapers, and the defendant, at their store, bargained for several articles. A separate price was agreed upon for each article, no one of which was of the value of ten pounds. Some of the goods were

measured in the presence of the defendant, some he marked, and others he assisted in cutting from a larger bulk. At his request, an account of the whole was sent to his house. The account amounted to seventy pounds, which he refused to pay. The goods were then sent to his house, but he refused to take them. It was held that this was one entire contract within the seventeenth section of the statute. Abbott, C. J., said: "Looking at the whole transaction, I am of the opinion that the parties must be considered to have made one entire contract for the whole of the articles." Bayley, J., said: "It is conceded that on the same day, and, indeed, at the same meeting, the defendant contracted with the plaintiff for the purchase of goods of a much greater value than ten pounds. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than ten pounds within the seventeenth section; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd, J., said: "This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of a less value than ten pounds, but in the course of the dealing it grew to be a contract for a much larger amount. At last, therefore, it was one entire contract, within the meaning and mischief of the Statute of Frauds; it being the intention of that statute that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of ten pounds, it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of ten pounds as if it had been originally of that amount." Said Best, J.: "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole articles." Story on Sales of Personal Property, Secs. 241, 261; Benjamin on Sales of Personal Property, p. 101. Lord Mansfield, in *Simon vs. Metwier*, 1 W. Black, p. 599, was of the opinion that sales by auction were not intended to be included within the statute, on account of the publicity with which such sales are made. It has been plausibly argued that as the statute was enacted for the purpose of preventing perjury, and that as the publicity of a sale at auction precludes all possibility of perjury as to the fact of sale, it could not have been the intention to include such sales within the statute. Neither the opinion of Lord

Mansfield nor the arguments adduced have met the approval of Courts, and it may now be considered as settled that sales by auction are within the statute.—Walker vs. Constable, 1 Bos. & Pull., p. 306; Buckminster vs. Harross, 13 Ves., p. 436; Hinde vs. Whitehouse, 7 East., p. 568; Kenworthy vs. Schofield, 2 Barn. & Cres., p. 945; Story on Sales of Personal Property, Sec. 264. But where the same person at auction buys several lots as they are offered, a distinct contract arises for each lot, and the rule of Baldey vs. Parker, 2 B. & C., p. 37, does not apply.—Emmerson vs. Heelis, 2 Taunt., p. 38; Rugg vs. Minett, 11 East., p. 218; Roots vs. Lord Dormer, 4 B. & Ad., p. 77. If at the time of the bargain it is uncertain whether the thing sold will be of the value of two hundred dollars, according to the terms of the contract, yet if it turns out that the value actually exceeds two hundred dollars, the statute applies.—Benjamin on Sales of Personal Property, p. 102.

MEMORANDUM IN WRITING.—See Benjamin on Sales of Personal Property, pp. 145-173, where the English authorities bearing upon the construction of this phrase are collated and commented upon with learning and ability. The proposed limits of this work preclude their presentation here.—See, also, Story on Sales, §§ 265-273; Bunting vs. Beidemen, 1 Cal., p. 181; Craig vs. Godfrey, 1 Cal., p. 415.

SUBSCRIBED BY THE PARTY.—It is well settled that the only signature required is that of the party against whom the contract is to be enforced. The contract is good or not at the election of the party who has not signed.—Allen vs. Bennett, 3 Taunt., p. 169; Thornton vs. Kempster, 5 Taunt., p. 786; Laythorp vs. Bryant, 2 Bing. N. C., p. 735; Reuss vs. Picksley, 35 Law R., 1 Ex., p. 342; Champion vs. Plummer, 1 N. R., p. 154; Egerton vs. Matthews, 6 East., p. 307; Weightman vs. Caldwell, 4 Wheat., p. 85; Western vs. Russel, 3 Ves. & Bean, p. 192; Martin vs. Mitchell, 2 Jac. & Walk., p. 426; Flight vs. Bolland, 4 Russ., p. 298; Ballard vs. Walker, 3 Johns. Cas., p. 10; Clason vs. Bailey, 14 Johns., p. 487; Russell vs. Nicoll, 3 Wend., p. 112; 2 Kent's Com., p. 510; Long on Sales, p. 54. The name of the party to be charged must be placed at the foot of the agreement.—James vs. Patten, 6 N. Y., p. 10; rev'g S. C., 8 Barb., p. 344; Davis vs. Shields, 26 Wend., p. 341; 3 Parsons on Contracts, p. 8. In the English statute and in the statutes of several of the States the word of the statute is not "subscribed," but "signed." Under such statutes it has

been held that the name written in any part of the agreement is sufficient.—3 Parsons on Contracts, p. 6; Benjamin on Sales, p. 174, et. seq.; Story on Sales, § 266; Penniman vs. Hartshorn, 13 Mass., p. 87. A mark by the party is sufficient, if so intended.—Baker vs. Dening, 8 Ad. & E., p. 94; and in Helshaw vs. Langley, 11 L. J., Ch. 17, the signature of the party was held to be sufficient when he, being unable to write, held the top of the pen while another person wrote his name. A description of the signer written by himself at the foot of the paper is insufficient. Thus, in Selby vs. Selby, 3 Mer., p. 2, a letter by a mother to her son beginning: "My dear Robert," and ending "your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother. "Whether," says Mr. Benjamin, "a signature by initials would suffice seems not to have been expressly decided."—Benjamin on Sales, p. 175; but see Hubert vs. Moreau, 2 C. & P., p. 523; Sweet vs. Lee, 3 M. & G., p. 452; Sugden on Vendors and Purchasers, p. 144. And it would seem that if the initials were intended as a signature by the party who writes them, they would be sufficient.—Caton vs. Caton, H. of L., pp. 127, 143. At common law the signature might be in writing or in print.—Benjamin on Sales, p. 177; Story on Sales, § 266. But under the Code it must be in writing.—See Subd. 2, Sec. 14 of this Code. The memorandum may be subscribed by the agent of the party to be charged.—See Secs. 2206, 2304, and 2305, of this Code.

ACCEPTS AND RECEIVES PART OF THE THING SOLD.—The corresponding words of the English statute are, "except the buyer shall accept part of the goods so sold, and actually receive the same." Commenting on this clause, Mr. Justice Blackburn (Blackburn on Sales, pp. 22, 23) observes: "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur; the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of the language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that

this part of the goods is to be taken by him as his property, under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reason at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts. The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order."

Says Mr. Story: "The words 'accept and actually receive' are understood to mean a final and absolute appropriation by the purchaser, either of the whole article sold, or of a part thereof. So long as the contract of sale is by its terms subject to avoidance by either party, or so long as either party has a claim upon the goods as against the other, no sufficient acceptance has taken place, although the title be passed, or mere possession of the subject matter of the sale be altered." Story on Sales, Sec. 276; Russel vs. Minor, 22 Wend., p. 659; Acebal vs. Levy, 10 Bing., p. 376; Smith vs. Surnam, 9 Barn. & Cres., p. 561; Carter vs. Touissant, 5 Barn. & Ald., p. 858. If by the terms of the sale the purchaser may return the goods within a fixed time, if they do not please him, the acceptance is not complete, so as to satisfy the statute, until such time elapses. So long as the purchaser is entitled to rescind the contract, or to object to the quantity or quality of the goods, or so long as the seller retains a lien, or may exercise the right of stoppage *in transitu*, the acceptance is not sufficient.—Acebal vs. Levy, 10 Bing., p. 384; Astley vs.

Emery, 4 Maule & Selw., p. 264; Baldey vs. Parker, 2 Barn. & Cres., p. 44; Howe vs. Palmer, 3 Barn. & Ald., p. 321; Phillips vs. Bistolli, 2 Barn. & Cres., p. 513; Kent vs. Huskisson, 3 Bos. & Pull., p. 233; Hanson vs. Armitage, 5 Barn. & Ald., p. 557.

ACCEPTANCE OF SAMPLE AS PART.—In *Hinde vs. Whitehouse*, 7 East., p. 558, sugar had been sold by auction; the defendant, being the highest bidder, received a sample of the sugar knocked down to him, and it was in proof that at such sales the samples were always delivered to purchasers as part of their purchase and to make up the quantity. This was held to be an acceptance of part of the goods sold. Said Lord Ellenborough: "Inasmuch as the half pound sample of sugar out of each hogshead in this case is, by the terms and conditions of the sale, so far treated as part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically if he should choose to have the commodity weighed, I cannot but consider it as part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer. And although it be delivered partly *alio intuitu*, namely: as a sample of quality, it does not therefore prevent its operating to another consistent intent, also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely: as a part of the delivery of the thing itself as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly. See, also, on this point, *Gardner vs. Grout*, 2 C. B., (N. S.), p. 340; *Klinitz vs. Surrey*, 5 Esp., p. 267; *Talver vs. West*, Holt, p. 178; *Foster vs. Frampton*, 6 B. & C., p. 107; *Gilliat vs. Roberts*, 19 L. J. Ex., p. 410.

In *Phillips vs. Bistolli*, 2 B. & C., p. 11, a purchaser of jewelry at auction held it in his hands for a few moments, and tendered it back, with the remark that there had been a mistake. The Court set aside a verdict for the plaintiff, and ordered a new trial, saying: "To satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with an intention of taking possession as owner." The doctrine of constructive acceptance, and the causes arising under it, are discussed and examined by Mr. Benjamin in his work on Sales of Personal Property. Page 108, et. seq., he says: "It is quite well settled that the acceptance

of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one of fact for the jury, and not matter of law for the Court. The acceptance must be clear and unequivocal." Upon this topic said Erle, J., in *Parker vs. Wallis*, 5 E. & B., p. 21: "If the vendee does any act to the goods of wrong, if he is not the owner of the goods, and of right if he is the owner of the goods, the doing of that act is evidence that he has accepted them."—See, also, *Chaplin vs. Rogers*, 1 East, p. 195; *Beaumont vs. Brengier*, 7 Taunt., p. 597; *Lillywhite vs. Devereux*, 15 M. & W., p. 285; *Baines vs. Jevons*, 7 C. & P., p. 288. Says Story: (*Story on Sales*, § 276), "It is not necessary that there should be a manual and actual reception of the goods; for if a complete constructive possession be given by symbol, so as to finally bind both parties, or if a final appropriation by the purchaser be necessarily implied from his acts so as to destroy all right to avoid the sale, or to object to it, or if they be delivered to an agent or bailee authorized to finally accept them, the acceptance will be sufficient. The only question is whether the contract is completely executed on the part of the vendor, and assented to finally by the vendee, so that the right of property and the possession are irrevocably changed."—*Tuxworth vs. Moore*, 9 Pick., p. 349. The delivery of a bill of lading or dock warrant, or of any other type or symbol of ownership, is considered to be sufficient upon the ground that thereby the possession is as absolutely changed as if the article of which it is the symbol were given.—*Chaplin vs. Rogers*, 1 East., p. 193; *Jewett vs. Warren*, 12 Mass., p. 300; *Gardiner vs. Howland*, 2 Pick., p. 602; *Brinley vs. Spring*, 7 Greenl., p. 241; *Tucker vs. Buffington*, 15 Mass., p. 477.

When the goods at the time of the sale are in possession of the vendee, it may be difficult to prove the receipt; but if it can be shown that the vendee has done acts not consistent with the supposition that his former possession has remained unchanged, these acts may be proved, and it is a question of fact for the jury whether the acts were done because the purchaser had taken to the goods as owner.—*Benjamin on Sales*, p. 126; *Edan vs. Dudfield*, 1 Q. B., p. 306; *Lillywhite vs. Devereux*, 15 M. & S., p. 285. "When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the

latter shall cease to hold the goods for the vendor, and shall hold them for the purchaser."—Benjamin on Sales, p. 127; Blackburn on Sales, p. 28; Bentall vs. Burn, 3 B. & C., p. 423; Lackington vs. Atherton, 7 M. & G., p. 360; Bill vs. Bament, 9 M. & W., p. 36; Lucas vs. Dorrien, 7 Taunt., p. 278; Woodley vs. Coventry, 2 H. & C., p. 164; Harman vs. Anderson, 2 Camp., p. 243; Farina vs. Horne, 16 M. & W., p. 119; Godts vs. Rose, 17 C. B., p. 229. If the vendor gives to the vendee an order on a warehouseman having the custody of the goods to deliver them to the vendee, and the warehouseman accepts the order and agrees to hold the goods for the vendee, the possession is thereby changed so as to satisfy the statute (Tuxworth vs. Moore, 9 Pick., p. 349; Hollingsworth vs. Napier, 3 Caines, p. 185; Wilkes vs. Ferris, 5 Johns., p. 335; Lucas vs. Dorrien, 7 Taunt., p. 278; Bentall vs. Burn, 3 Barn. & Cres., p. 423); and this is so though no transfer be made upon the books of the warehouseman.—Harman vs. Anderson, 2 Camp., p. 245. But if the warehouseman refuse to accept the order or to recognize the vendee as the owner, the delivery would not be sufficient to satisfy the statute.—Bentall vs. Burn, 3 Barn. & Cres., p. 423. If the goods are on the premises of a third person, not a bailee of them—as timber cut down and at the disposal of the vendor on the land of another person, or at his disposal at a free wharf—the delivery may be made by the vendor placing the goods at the disposal and under the control of the vendee.—Tausley vs. Turner, 2 Bing. N. C., p. 151; Cooper vs. Bill, 34 L. J. Ex., p. 161; 3 H. & C., p. 722. Delivery to a common carrier, or to one designated by the purchaser for conveyance to him, constitutes an actual receipt by the purchaser.—Dawes vs. Peck, 8 T. R., p. 330; Waite vs. Baker, 2 Ex., p. 1; Fragano vs. Long, 4 B. & C., p. 219; Dunlap vs. Lambert, 6 Cl. & Fin., p. 600; Johnson vs. Dodgson, 2 M. & W., p. 653; Norman vs. Phillips, 14 M. & W., p. 277; Meredith vs. Meigh, 2 E. & B., p. 364; Cusack vs. Robinson, 1 B. & S., p. 299; Hart vs. Bush, 27 L. J. Q. B., p. 271. But such a receipt does not constitute an acceptance by the buyer unless the carrier or person is the authorized general agent of the purchaser, for the delivery is not final, the seller still having the right of stoppage *in transitu*.—Astley vs. Emery, 4 Maule & Selw., p. 264; Hanson vs. Armitage, 5 Barn. & Ald., p. 321. And as long as the seller preserves sufficient control over the goods to retain the right of stoppage *in transitu*, he prevents the vendee from accepting them as his own within the

meaning of the statute.—*Baldey vs. Parker*, 2 B. & C., p. 67; *Howe vs. Palmer*, 3 B. & A., p. 321; *Tempest vs. Fitzgerald*, 3 B. & A., p. 680; *Carter vs. Touissant*, 5 B. & A., p. 855; *Smith vs. Surnam*, 9 B. & C., p. 561; *Bill vs. Bament*, 9 M. & W., p. 37; *Hawes vs. Watson*, 2 B. & C., p. 511; *Maberly vs. Sheppard*, 10 Bing., p. 101; *Cusack vs. Hoskins*, 9 Exch., p. 753; *Dodsley vs. Varley*, 12 Ad. & E., p. 632; *Howes vs. Ball*, 7 B. & C., p. 484.

PAYS PART OF THE PRICE.—The corresponding words of the English statute are: "or give something in earnest to bind the bargain or in part payment." Story says "this exception was founded upon an old custom, common in England at the time when this statute was enacted, for the purchaser to pay a small portion of the purchase money in token of the conclusion and ratification of the sale.—2 Black. Com., p. 447. Some formal act by which conclusive assent is manifested to the terms of a bargain has been common to all countries and in all ages. The Jew plucked off one shoe and gave it to his neighbor.—*Ruth*, ch. 4, v. 7, 8, 9. The people of the northern nations shook hands.—*Bracton* I, 2, c. 27. The Indian smokes a pipe."—Story on Sales, § 273. But the giving of earnest has fallen into disuse, and is therefore omitted from the statute, and now nothing short of an actual bona fide payment of a portion of the price will satisfy the statute.—*Benjamin on Sales*, p. 135; Story on Sales, § 273. An agreement to set off a debt due the buyer is a part payment within the statute, if made subsequently to the sale or by an independent contract at the time of sale, such as the giving of a receipt by the buyer for the debt, but if the agreement is one of the terms of the contract of sale itself, it is not such a payment as the statute requires.—*Benjamin on Sales*, pp. 138-140; *Walker vs. Nussey*, 16 M. & W., p. 302.

The "part payment" need not be made in money, but in anything of value which, by agreement, is given by the buyer and accepted by the seller "on account," as for instance the transfer to the vendor of a bill or note.—*Chamberlyn vs. Delarive*, 2 Wils., p. 253; *Kearslake vs. Morgan*, 5 T. R., p. 513; *Griffiths vs. Owen*, 13 M. & W., p. 58. The effect of part payment is only to bind the bargain, and not to change the title.—Story on Sales, § 274. The buyer can only take the goods upon payment of the balance of the agreed price, and the seller can only claim the balance of the purchase money upon tendering the article sold. If the purchaser, within a reasonable time, does not pay for

and take away the goods, they may be resold to another person.—2 Kent's Com., p. 495; Goodall vs. Skelton, 2 H. Black, p. 316; Langfort vs. Tiler, 1 Salk. R., p. 113; 6 Mod., p. 162; Hinde vs. Whitehouse, 7 East, p. 571; Roberts on the Stat. of Frauds, pp. 164-171.

1740. An agreement to manufacture a thing, from materials furnished by the manufacturer, or by another person, is not within the provisions of the last section.

Contract
to manu-
facture.

NOTE.—The seventeenth section of the English statute has been held not to apply to executory agreements, but only to such as were equivalent to the common law contract of bargain and sale.—Towers vs. Osborne, 1 Strange, p. 506; Clayton vs. Andrews, 4 Burr, 2101; Groves vs. Buck, 3 M. & S., p. 178; but the contrary was held in Rondeau vs. Wyatt, 2 H. Bl., p. 63; Cooper vs. Elston, 7 T. R., p. 14; and Garbut vs. Watson, 5 B. & A., p. 613. The question was settled in England by the passage of the Act known as "Lord Tenterden's Act" (9 Geo. IV, Chap. 14, Sec. 87), which recites that "it has been held that the said recited enactments" (i. e. the seventeenth section of the Statute of Frauds) "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," and then proceeds to enact that the provisions of the seventeenth section "shall extend to all contracts for the sale of goods of the value of ten pounds sterling, or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." Sec. 1739 of this Code expressly includes executory contracts, and Sec. 1740 contains the exception to the rule, and exempts from the operation of the statute executory contracts for the future delivery of goods after they shall be manufactured.—Donovan vs. Willson, 26 Barb., p. 138; Parker vs. Schenck, 28 Barb., p. 38; Courtwright vs. Stewart, 19 Barb., p. 455; Bronson vs. Wiman, 10 Barb., p. 406; Robertson vs. Vaughn, 5 Sandf., p. 1; Sewall vs. Fitch, 8 Cow., p. 215; Crookshank vs. Burrell, 18 Johns., p. 58; Clayton vs. Andrews, 4 Burr, 2101; Cooper vs. Elston, 7 T. R., p. 14; Smith vs. Surnam, 9 Barn. & Cres., p. 561;

Bennett vs. Hull, 10 Johns., p. 364; Watt vs. Friend, 10 Barn. & Cres., p. 446; Jackson vs. Covert, 5 Wend., p. 139; 1 Kent Com., p. 511; Ross on Vendors, p. 8; Story on Sales, Sec. 260; Benjamin on Sales, p. 70.

Amu

Contract
for sale
of real
property.

1741. No agreement for the sale of real property, or of any estate therein, other than an estate for a term not exceeding one year, is valid, unless a memorandum thereof, showing the parties, their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged, or his agent, thereunto authorized in writing, or unless the contract has been partially performed by the party seeking to enforce it, and such part performance has been accepted by the other.

NOTE.—Stats. Charles II, Ch. 3, Sec. 4; Stats. 1850, p. 266, Sec. 8. Sec. 8 of the Stat. of 1850 reads as follows: "Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." And Sec. 9 is as follows: "Every instrument required to be subscribed by any person under the last preceding section, may be subscribed by the agent of such party duly authorized." It will be seen that the memorandum required by Sec. 1741 does not require the consideration to be expressed; this is in harmony with other provisions of the Codes, which make a writing import a consideration. Under Secs. 8 and 9 of the Stats. of 1850, the agent might be appointed without writing.—Coles vs. Trecothick, 9 Ves., p. 250; Mortlock vs. Buller, 10 Ves., p. 292; Clinan vs. Cooke, 1 Sch. & Lef., p. 22; Graham vs. Musson, 7 Scott, p. 769; Rucker vs. Canmeyer, 1 Esp., p. 105; Wright vs. Dannah, 2 Camp., p. 203; Inhabitants of Alna vs. Plummer, 4 Greenl., p. 258; McWhorter vs. McMahon, 10 Paige, p. 386; Lawrence vs. Hill, 5 N. Y., p. 107; Worral vs. Munn, 1 Seld., p. 229; Hawkins vs. Chace, 19 Pick., p. 505; Ulen vs. Kittredge, 7 Mass., p. 235; Yerby vs. Grigsby, 9 Leigh, p. 387; Johnson vs. McGruder, 15 Mo., p. 365; Talbot vs. Bowen, 1 A. K. Marsh, p. 436; Coleman vs. Bailey, 4 Bibb., p. 297; Curtis vs. Blair, 4 Cush., p. 309; Johnson vs. Dodge, 17 Ill., p. 433. Mr. Fell (Merc. Grear., Appendix No.

VI) argues with great force against the propriety of this rule, but admits that the law is settled in favor of it. Sec. 1741 changes the rule, and hereafter the agent must be authorized in writing.

The provision in relation to the effect of part performance is doubtless rather broader than the rules of equity would sustain, as it has always been required that, to take the case out of the statute, the party seeking to enforce an oral contract must show that he cannot be replaced in his former position.—*Malins vs. Brown*, 4 N. Y., p. 403; *Bennett vs. Abrams*, 41 Barb., p. 619; *Williston vs. Williston*, id., p. 635; *Lowry vs. Tew*, 3 Barb. Ch., p. 407; *Rhodes vs. Rhodes*, 3 Sandf. Ch., p. 279; *Wolfe vs. Frost*, 4 id., p. 72; *German vs. Machin*, 6 Paige, p. 238; *Frame vs. Dawson*, 14 Ves., p. 386. But it is to be remembered that the equitable doctrine of part performance was always in contradiction of the letter of the statute, and that the Courts might therefore well hesitate to go so far as their sense of abstract justice would have dictated. In reducing their doctrines to the form of a statute, it seems only proper to adopt the principle which lies at the foundation of those decisions, without the restrictions which were imposed from a regard for the adverse provisions of the Statute of Frauds. Many of the principles stated and cases cited in note to Sec. 1739 will be found applicable to the interpretation of the provisions of Sec. 1741.

CHAPTER II.

RIGHTS AND OBLIGATIONS OF THE SELLER.

ARTICLE I. RIGHTS AND DUTIES BEFORE DELIVERY.

II. DELIVERY.

III. WARRANTY.

ARTICLE I.

RIGHTS AND DUTIES BEFORE DELIVERY.

SECTION 1748. When seller must act as depositary.

1749. When seller may resell.

1748. After personal property has been sold, and

When
seller must
act as
depository.

until the delivery is completed, the seller has the rights and obligations of a depository for hire, except that he must keep the property, without charge, until the buyer has had a reasonable opportunity to remove it.

NOTE.—The seller is bound to keep the thing sold safely, even if the buyer does not come at the proper time to take it.—*Sheldon vs. Skinner*, 4 Wend., p. 525. But he is entitled to compensation for his trouble.—*Id.* And unquestionably he may discharge himself of the burden upon due notice.—See the Chapter on Deposit for Hire. He may also deposit the thing with a third person.—*Bennett vs. Smith*, 15 Wend., p. 493.

When
seller may
resell.

1749. If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price, in the manner prescribed by the Title on Liens.

NOTE.—Rescinding sale.—*Fancher vs. Goodman*, 29 Barb., p. 315; *Niel vs. Cheves*, 1 Bail S. C., p. 537. Enforcement of lien.—*Fancher vs. Goodman*, 29 Barb., p. 315; *Mallory vs. Lord*, *id.*, p. 454; *Sands vs. Taylor*, 5 Johns., p. 395; *Bement vs. Smith*, 15 Wend., p. 497; *Bogart vs. O'Regan*, 1 E. D. Smith, p. 590; *Maclean vs. Dunn*, 4 Bing., p. 722.

ARTICLE II.

DELIVERY.

SECTION 1753. Delivery on demand.

1754. Delivery, where made.

1755. Expense of transportation.

1756. Notice of election as to delivery.

1757. Buyer's directions as to manner of sending thing sold.

1758. Delivery to be within reasonable hours.

Delivery on
demand.

1753. One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand, unless he has a lien thereon.

NOTE.—“There is no branch of the law,” says Mr.

Benjamin, "more confusing to the student than delivery. This results from the fact that the word is unfortunately used in very different senses, and unless these different significations are carefully borne in mind the decisions would furnish no clue to a clear perception of principles. *First*—The word delivery is sometimes used with reference to the passing of the *property* in the chattel, sometimes to the change of the *possession* of the chattel; in a word, it is used to denote transfer of *title*, or transfer of *possession*. *Secondly*—Even where 'delivery' is used to signify the transfer of *possession*, it will be found that it is employed in two distinct classes of cases, one having reference to the *formation* of the contract, the other to the *performance* of the contract. When questions arise as to the 'actual receipt' which is necessary to give validity to a parol contract for the sale of chattels exceeding £10 in value, the Judges constantly use the word 'delivery' as the correlative of that 'actual receipt.' After the sale has been proven to *exist*, by delivery and actual receipt, there may arise a second and distinct controversy upon the point whether the vendor has *performed* his completed bargain by delivery of possession of the bulk to the purchaser. *Thirdly*—Even when the subject under consideration is the vendor's delivery of possession in *performance* of his contract, there arises a fresh source of confusion in the different meanings attached to the word 'possession.' In general, it would be perfectly proper, and even technical, to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the vendor. The buyer owns the goods, has the right of possession; may take them away, sell, or dispose of them at his pleasure, and maintain trover for them. Yet, if he became insolvent, the vendor is said to have retained possession. Again, if the vendor has delivered the goods to a carrier, for conveyance to the purchaser, he is said to have lost his lien, because the goods are in the buyer's possession, the carrier being the agent of the buyer; but if the vendor claim to exercise the right of stoppage *in transitu*, while the carrier is conveying them, the goods are said to be in the *constructive*, not in the *actual possession* of the buyer."—Benjamin on Sales, pp. 497, 498. Says Mr. Story: "There are four different species of delivery. *First*—That delivery which suffices to pass the title, so that, if the goods be destroyed, the loss falls upon the vendee. *Second*—That delivery which suffices to destroy the lien of the vendor, which con-

sists in a total and unqualified surrender of possession, and of special claim to retain the goods, by the vendor. *Third*—That delivery which is necessary to satisfy the requisitions of the Statute of Frauds, in case the contract is not in writing, which requires not only an utter relinquishment of possession by the vendor, but also an absolute and final appropriation by the vendee, so as to destroy the right of either party to rescind the contract. These different species of delivery must be strictly distinguished from each other, or the cases will present nothing but embarrassment and confusion to the student. It must be remembered that a delivery may be sufficient to pass the title which is not always sufficient to destroy a lien; and that a delivery which will defeat the lien of the vendor may not be sufficient to satisfy the requisitions of the Statute of Frauds."—Story on Sales, § 295; *Clarke vs. Spence*, 4 Adolph. & Ell., p. 466; *Tarling vs. Baxter*, 6 Barn. & Cress., p. 364. The seller must put the property in a condition fit for delivery.—*Gerard vs. Prouty*, 34 Barb., p. 454. In every sale of personal property there is an implied stipulation to deliver.—*Buddle vs. Green*, 27 L. J. Ex., p. 33; 3 H. & N., p. 996. This stipulation is broken by the refusal of a third person in possession, even though unjustifiable on his part.—*Id.* The delivery must be made within a reasonable time.—*Terwilliger vs. Knapp*, 2 E. D. Smith, p. 86; *Kipp vs. Wiles*, 3 Sandf., p. 585; *Brightly vs. Norton*, 3 B. & S., p. 305; *Toms vs. Wilson*, 4 B. & S., p. 442. After demand.—*Jones vs. Gibbons*, 8 Exch., p. 922; *Bach vs. Owen*, 5 T. R., p. 409; *Radford vs. Smith*, 3 M. & W., p. 254. This right of delivery is however only *prima facie*, and it "may well be bargained that the possession shall remain with the vendor until the fulfilment of certain conditions precedent by the purchaser. Where nothing is said as to payment, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. The vendor cannot insist on payment of the price without alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price. But it constantly happens that there is a stipulation contrary to this, and that the parties agree that the buyer is to take possession of the goods before paying for them, or, in the usual phrase, that the goods are sold on credit. The legal effect then is, that there has been an actual transfer of title, and an actual transfer of the *right of possession* by the bargain, so that in

pleading, and for all purposes, save that of the vendor's lien for the price, the buyer is considered as being in possession, by virtue of the general rule of law that 'the property of personal chattels draws to it the possession.' But although the buyer has thus acquired the *right of possession*, not to be questioned, for any legal purpose, by any one save his vendor, the latter may refuse to part with the goods, and may exercise his lien as a vendor to secure the payment of the price, if the purchaser has *become insolvent* before obtaining the actual possession."—Benjamin on Sales, pp. 499, 500; Bloxam vs. Sanders, 4 B. & C., p. 941; Tooke vs. Hollingworth, 5 T. R., p. 215; Hanson vs. Meyer, 6 East, p. 614; Macon vs. Lickbarrow, 1 H. Bl., p. 357; Ellis vs. Hunt, 3 T. R., p. 464; Hodgson vs. Loy, 7 T. R., p. 440; Inglis vs. Usherwood, 1 East, p. 515; Bohtlurk vs. Ingis, 3 East, p. 381.

1754. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced. Delivery.
where
made.

NOTE.—In the absence of an agreement to that effect the vendor is not bound to send the goods to the buyer; he is only bound to place the goods at the buyer's disposal, so that he may remove them without lawful obstruction.—Benjamin on Sales, p. 502; Salter vs. Woollams, 2 M. & G., p. 650; Smith vs. Chance, 2 B. & A., p. 753; Wood vs. Manley, 11 Ad. & E., p. 34; Wood vs. Leadbitter, 13 M. & W., p. 383; Taplin vs. Florence, 10 C. B., p. 765; Wood vs. Tassel, 6 Q. B., p. 234. If nothing is said about it in the bargain, the goods are to be at the buyer's disposal at the place where sold. "The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept must be the place where the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place."—2 Kent's Com., p. 677; Co. Lit., p. 210b; Benjamin on Sales, pp. 504, 505; Bronson vs. Gleason, 7 Barb., p. 472; Barr vs. Myers, 2 Watts & S., p. 295. If the thing is not in existence at the time the contract is made, it must in the absence of express stipulations to the contrary be delivered at the place where it is produced.—Rice vs. Churchill, 2 Denio, p. 145.

1755. One who sells personal property must bring

Expense of
transporta-
tion.

it to his own door, or other convenient place, for its acceptance by the buyer, but further transportation is at the risk and expense of the buyer.

NOTE.—Benjamin on Sales, p. 504.

Notice of
election as
to delivery.

1756. When either party to a contract of sale has an option as to the time, place, or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time, his right of option is waived.

NOTE.—So held as to place (*Rogers vs. Van Hoesen*, 12 Johns., p. 221; *Peck vs. Hubbard*, 11 Verm., p. 612), and the same principle seems to apply to the time and mode of delivery. The obligation is not extinguished by the failure of either party to give notice of his election as to the mode of its performance.—*Gilbert vs. Danforth*, 6 N. Y., p. 585; *Livingston vs. Miller*, 11 id., p. 80.

Buyer's
directions
as to
manner of
sending
thing sold.

1757. If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions, or if, in the absence of special directions he uses ordinary care in forwarding the thing, it is at the risk of the buyer.

NOTE.—*Bull vs. Robinson*, 10 Exch., p. 342; *Orcutt vs. Nelson*, 1 Gray, p. 536; *Jones vs. Sims*, 6 Porter, p. 161. If nothing is said as to time, the goods must be sent within a reasonable time.—*Ellis vs. Thompson*, 3 M. & N., p. 445; *Jones vs. Gibbon*, 8 Ex., p. 920; *Sansom vs. Rhodes*, 8 Scott, p. 544. But if the "time" is expressed in the contract, the question is one of construction and of law for the Court.—Benjamin on Sales, p. 506. Delivery "directly."—*Duncan vs. Topham*, 8 C. & B., p. 225. "As soon as possible."—*Atwood vs. Emory*, 1 C. B. (N. S.), p. 110. "Reasonable time."—*Brightly vs. Norton*, 3 B. & S., p. 305; *Toms vs. Wilson*, 4 B. & S., p. 442. "Forthwith."—*Stainton vs. Wood*, 16 Q. B., p. 638; *Roberts vs. Brett*, 11 H. of L., p. 337.

1758. The delivery of a thing sold can be offered or demanded only within reasonable hours of the day.

Delivery to be within reasonable hours.

NOTE.—Startup vs. MacDonald, 2 M. & G., p. 395.

ARTICLE III.

WARRANTY.

SECTION 1763. Warranty, what.

- 1764. No implied warranty in mere contract of sale.
- 1765. Warranty of title to personal property.
- 1766. Warranty on sale by sample.
- 1767. When seller knows that buyer relies on his statements, etc.
- 1768. Merchandise not in existence.
- 1769. Manufacturer's warranty against latent defects.
- 1770. Thing bought for particular purpose.
- 1771. When thing cannot be examined by buyer.
- 1772. Trade marks.
- 1773. Other marks.
- 1774. Warranty on sale of written instrument.
- 1775. Warranty of provisions for domestic use.
- 1776. Warranty on sale of good will.
- 1777. Warranty upon judicial sale.
- 1778. Effect of general warranty.

1763. A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future.

Warranty, what.

NOTE.—See Roberts vs. Morgan, 2 Cow., p. 438; Carley vs. Wilkins, 6 Barb., p. 557; Cook vs. Moseley, 13 Wend., p. 277; Ender vs. Scott, 11 Ill., p. 35; Humphreys vs. Comline, 8 Blackf., p. 508. Warranty, as applied to the conveyance and sale of lands, was a covenant real, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and either upon voucher or judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by paramount title.—Co. Litt., p. 365; Touchst., p. 181. But warranty in its original form is unknown to the jurisprudence of the United States. It, with all "its most curious and cunning learning," has given way to the plain and pliable form of a covenant; and this covenant, like all other covenants, has always been held to

sound in damages, which, after judgment, may be recovered out of the estate of the judgment debtor, as in other cases.—4 Kent Com., p. 457; 3 Rawle, p. 67; 9 Serg. & Rawle, p. 268; 2 Saund., p. 38; 2 Wheat., p. 45. Warranties in relation to the sale of personal property are either express or implied. Bouvier defines the former as a “warranty by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is or is not as there mentioned, as: that a horse is sound, that he is not five years old;” and the latter as a “warranty which, not being expressly made, the law implies by the fact of sale; for example, the seller is understood to warrant the title of the goods he sells when they are in his possession at the time of the sale (Ld. Raymond, p. 593; 1 Salk, p. 210); but if they are not then in his possession the rule of *caveat emptor* applies, and the buyer purchases at his own risk (Cro. Jac. p. 197.)” The distinction taken between goods in possession of the vendor and those not in possession was decisively repudiated by Butler, Justice, in *Pasley vs. Freeman*, 3 T. R., p. 5, and by the Judges in *Eicholz vs. Banister*, 17 C. B. (N. S.), p. 708, and in *Morley vs. Attenborough*, 3 Ex., p. 500. Mr. Benjamin, in view of the recent decisions in that country, declares the law of England to be that a warranty of title is implied from the sale, whether the vendor is in possession of the property or not.—Benjamin on Sales, p. 476. In America the distinction has been fully upheld, and the rule is that, as to goods in possession of the vendor, there is an implied warranty of title.—*Vibbard vs. Johnson*, 19 Johns., p. 78; *Case vs. Hall*, 24 Wendell, p. 102; *Dorr vs. Fisher*, 1 Cushing, p. 273; *Bennett vs. Bartlett*, 6 Cush., p. 225; 2 Kent’s Com., p. 631. But where the goods sold are in possession of a third party at the time of the sale there is no such warranty, and the vendee buys at his peril. *Long vs. Hickingbottom*, 28 Miss., p. 772; *McCoy vs. Archer*, 3 Barb., p. 323; *Huntington vs. Hall*, 36 Maine, p. 501; *Dresser vs. Ainsworth*, 9 Barb., p. 619; *Edick vs. Crim*, 10 Barb., p. 445; 2 Kent’s Com., p. 631. In Perkins’ Edition of Story on Contracts (3 ed.), Sec. 367, the distinction is maintained; and it is said, in a note (p. 459), that it “has now become so deeply rooted in the decisions of the Courts, in the *dicta* of Judges, and in the conclusions of learned authors and commentators, that even if it were shown to be misconceived in its origin it could not at this day be easily eradicated.” That the distinction between sales of goods in the possession

of the vendor and those not in his possession was originally adopted on insufficient authority, and that it is not founded in reason or on principle, will not be doubted by any one who reads the able and exhaustive arguments found in the English cases cited. Even Mr. Story himself, in the first edition of his work on sales, applies the rule without distinction.—Story on Sales (1 ed.), Sec. 367. The Code abolishes the distinction, and follows the rule of the later English cases. See Sec. 1765. No special form of words is necessary to create a warranty; any affirmation made at the time of the sale is a warranty, provided it appear in evidence to have been so intended.—Cross vs. Gardner, Carthew, p. 90; 3 Mod., p. 261; 1 Show, p. 68; Medina vs. Stoughton, 1 Ld. Raymond, p. 593; Pasley vs. Freeman, 3 T. R., p. 57; 2 Smith's Leading Cases, p. 71; Power vs. Barham, 4 A. & E., p. 473; Shepherd vs. Kain, 5 B. & A., p. 240; Freeman vs. Baker, 5 B. & Ad., p. 797; Hopkins vs. Tanquery, 15 C. B., p. 130; Taylor vs. Bullen, 6 Ex., p. 779; Powell vs. Horton, 2 Bing. N. C., p. 668; Allen vs. Lake, 18 Q. B., p. 560; Simon vs. Braddon, 2 C. B. (N. S.), p. 324; Hopkins vs. Hitchcock, 14 C. B. (N. S.), p. 65; Roberts vs. Morgan, 2 Cowen, p. 438; Oneida M. Co. vs. Lawrence, 4 Cowen, p. 440; Chapman vs. March, 19 Johns., p. 290; Whitney vs. Sutton, 10 Wend., p. 411; Story on Sales, Sec. 357. In determining whether the affirmation was intended as a warranty, "a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter not."—Benjamin on Sales, p. 454; Pasley vs. Freeman, 3 T. R., p. 51; Powell vs. Barham, 4 A. & E., p. 473; Jendwine vs. Slade, 2 Esp., p. 572; Carter vs. Crick, 4 H. & N., p. 412; Story on Sales, Sec. 357. See generally on the subject of warranty, Benjamin on Sales, pp. 452-495, and Story on Sales, Secs. 348-385.

1764. Except as prescribed by this Article, a mere contract of sale or agreement to sell does not imply a warranty.

No implied warranty in mere contract of sale.

NOTE.—In relation to contracts or agreements for the sale or conveyance of lands, this section must be construed in connection with Secs. 1732 and 1113 of

this Code, and in the light of the rules prescribed in Part V of the Political Code, which part is printed in the appendix to this volume.

Warranty
of title to
personal
property.

1765. One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto.

NOTE.—This section is a departure from the American rule, but is in accord with the recent English decisions. Under this section a warranty of the title is implied from the sale, whether the goods are in possession of the vendor or of third parties at the time of the sale. See note to Sec. 1764.

Warranty
on sale by
sample.

1766. One who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample.

NOTE.—*Waring vs. Mason*, 18 Wend., p. 425; *Bradford vs. Manley*, 13 Mass., p. 139; *Williams vs. Spafford*, 8 Pick., p. 250; see *Beirne vs. Dord*, 5 N. Y., p. 95; *Hargous vs. Stone*, id., p. 73. The text states a well settled rule of law.—*Benjamin on Sales*, p. 482; *Story on Sales*, § 376. But it is not every case in which a sample is exhibited that the sale is "by sample." A sample may be shown by the vendor, but he may, at the same time, decline to sell by it, and require the purchaser to inspect the bulk at his own risk, or the buyer may refuse to trust to the sample and the implied warranty and require an express warranty.—*Benjamin on Sales*, p. 482; *Story on Sales*, § 376; *Tye vs. Fynmore*, 3 Camp., p. 462; *Gardiner vs. Gray*, 4 Camp., p. 144; *Powell vs. Horton*, 2 Bing. N. C., p. 668; *Josling vs. Kingsford*, 13 C. B. (N. S.), p. 447; *Meyer vs. Everth*, 4 Camp., p. 22.

When
seller
knows that
buyer
relies
on his
statements,
etc.

1767. One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.

NOTE.—*Story on Sales*, § 374; *Schneider vs. Heath*, 3 Camp., p. 506; *Baglehole vs. Walters*, 3 Camp., p. 154; *Hough vs. Richardson*, 3 Story, p. 690. Said Mr.

Justice Story, in *Doggett vs. Emerson*, 3 Story: "It appears to me that it is high time that the principles of Courts of equity upon the subject of sales and purchases should be better understood and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing, and public justice and policy that every vendor should distinctly comprehend, not only that good faith should reign over all of his conduct in relation to the sale, but there should be a most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial whether the representation be willfully and designedly false or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters or proclaims or knowingly impresses upon the vendee as lure or decisive motive for the bargain. And I cannot but believe, if this doctrine of the law had been steadfastly kept in view and fairly upheld by public opinion, the various speculations, which have been so sad a reproach to our country, would have been greatly averted, if not entirely suppressed, by its salutary operation." For an able and elaborate discussion of a kindred topic see the opinion of Chief Justice Wallace, delivered at the January Term, 1872, of the Supreme Court of this State, in the case of *Roseman & Howland vs. Canovan & Sandborn*.

1768. One who agrees to sell merchandise not then in existence, thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so, at the place of delivery, as can be secured by reasonable care.

Merchandise not in existence.

NOTE.—This principle, though not directly adjudicated, is clearly at the foundation of the decisions in regard to sales of goods to be manufactured by the seller, and is a necessary corollary of the rule which implies a warranty of goods which the buyer has had no opportunity to inspect. *Hamilton vs. Ganyard*, 34 Barb., p. 204, supports the rule here stated. The absolute warranty extends only to the place of production.

The inevitable injuries of transportation must be borne by the buyer.—*Bull vs. Robison*, 10 Exch., p. 342. But of course this is to be construed in view of the intention of the parties. If an article is purchasable in San Francisco in perfect condition, and the same kind of thing is imported from London, but is always injured by the voyage, the seller cannot compel the buyer to accept the latter article, unless the parties contemplated London as the place of production.

Manufacturer's warranty against latent defects.

1769. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

NOTE.—*Hoe vs. Sanborn*, 21 N. Y., p. 552.

Thing bought for particular purpose.

1770. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose.

NOTE.—*Brown vs. Edgington*, 2 M. & G., p. 279; *Shepherd vs. Pybus*, 3 id., p. 868; *Howard vs. Hoey*, 23 Wend., p. 351; *Jones vs. Bright*, 5 Bing., p. 533; *Beals vs. Olmstead*, 24 Verm., p. 114; see *Hoe vs. Sanborn*, 21 N. Y., p. 552; *Taylor vs. Sands*, 5 Johns., p. 403; *Laing vs. Fidgeon*, 6 Taunt., p. 108.

When thing cannot be examined by buyer.

1771. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable.

NOTE.—*Wieler vs. Schilizzi*, 17 C. B., p. 619; *Cleu vs. M'Pherson*, 1 Bosw., p. 480; *Hamilton vs. Ganyard*, 34 Barb., p. 204.

Trade marks.

1772. One who sells or agrees to sell any article to which there is affixed or attached a trade mark, thereby warrants that mark to be genuine and lawfully used.

NOTE.—From Stats. 25 and 26 Vict., Chap. 88, Sec. 19. This statute enacts that this warranty can be dispensed with only by a written refusal to warrant.

1773. One who sells or agrees to sell any article

to which there is affixed or attached a statement or mark to express the quantity or quality thereof, or the place where it was, in whole or in part, produced, manufactured, or prepared, thereby warrants the truth thereof.

Other
marks.

NOTE.—Stats. 25 and 26 Vict., Chap. 88.

Am 1774. One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.

Warranty
on sale of
written
instru-
ment.

NOTE.—“What it purports to be.”—Gurney vs. Womersley, 4 El. & Bl., p. 133; Cabot Bank vs. Morton, 4 Gray, p. 156; Herrick vs. Whitney, 15 Johns., p. 240; Gompertz vs. Bartlett, 2 El. & Bl., p. 849; Canal Bank vs. Bank of Albany, 1 Hill, p. 287. “Binding upon all the parties.”—Delaware Bank vs. Jarvis, 20 N. Y., p. 226; Furniss vs. Ferguson, 15 id., p. 437; Young vs. Cole, 2 Bing N. C., p. 724; 4 Scott, p. 489. “Insolvency.” In some cases the value of an obligation may be entirely independent of the solvency of the party bound thereby, as, for example, where he is bound to execute a power. “Invalidity.”—Brown vs. Montgomery, 20 N. Y., p. 287. He does not warrant *the solvency* of the parties.—Elwell vs. Chamberlain, 4 Bosw., p. 320.

1775. One who makes a business of selling provisions for domestic use warrants by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome.

Warranty
of
provisions
for
domestic
use.

NOTE.—Burnby vs. Bollett, 16 M. & W., p. 644; Moses vs. Mead, 1 Denio, p. 379; 5 id., p. 617; Goldrich vs. Ryan, 3 E. D. Smith, p. 324; Hyland vs. Sherman, 2 id., p. 234; Van Bracklin vs. Fonda, 12 Johns., p. 468. In a recent English decision (Emmerton vs. Mathews, 7 H. & N., p. 586), it was held that no such warranty is implied; that the seller's liability rests

solely upon the ground of fraud; and, therefore, that he is not liable unless he knows that the provisions are bad. See, also, 3 Black. Com., p. 166; Chitty on Contracts, p. 418; Benjamin on Sales, p. 493.

Warranty
on sale of
good will.

1776. One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers.

Warranty
upon
judicial
sale.

1777. Upon a judicial sale, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.

NOTE.—The Monte Allegre, 9 Wheat., p. 644; Morgan vs. Fencher, 1 Blackf., p. 10; Bashore vs. Whisler, 3 Watts, p. 490; Peto vs. Blades, 5 Taunt., p. 657.

Effect of
general
warranty.

1778. A general warranty does not extend to defects inconsistent therewith of which the buyer was then aware, or which were then easily discernible by him without the exercise of peculiar skill; but it extends to all other defects.

NOTE.—Schuyler vs. Russ, 2 Caines, p. 202; Long vs. Hicks, 2 Humph., p. 306; Southern vs. Howe, 2 Rolle, p. 5; see Bidwell vs. Northwestern Ins. Co., 24 N. Y., p. 302; Horsfall vs. Thomas, 1 Hurlst. & Colt., p. 90; Birdseye vs. Frost, 34 Barb., p. 367. "But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect."—Benjamin on Sales, p. 457.

CHAPTER III.

RIGHTS AND OBLIGATIONS OF THE BUYER.

SECTION 1784. Price, when to be paid.

1785. Right to inspect goods.

1786. Rights in case of breach of warranty.

Price,
when to
be paid.

1784. A buyer must pay the price of the thing sold on its delivery, and must take it away within a reasonable time after the seller offers to deliver it.

NOTE.—"Pay the price."—Tipton vs. Feitner, 20

N. Y., p. 423; Benjamin on Sales, p. 524. Of course this rule, like most of the others, may be varied by agreement. "Taking away." He is allowed a reasonable time for this purpose, according to circumstances.—Buddle vs. Green, 27 L. J. Ex., p. 33; 3 H. & N. (Am. ed.), p. 996. But if the vendee do not take the goods within a reasonable time after the sale, upon the request of the vendor, the vendee will be liable for warehouse charges and other expenses, or if the vendor is prejudiced by the delay, to an action for damages.—Benjamin on Sales, p. 519; Greaves vs. Ashlin, 3 Camp., p. 426. The seller must put the buyer in motion before he can take advantage of this provision.—Jones vs. Gibbons, 8 Exch., p. 922.

1785. On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it; and may rescind the contract if the seller refuses to permit him to do so. Right to inspect goods.

NOTE.—Benjamin on Sales, p. 519; Lorymer vs. Smith, 1 B. & C., p. 1; Toulmin vs. Headly, 2 C. & K., p. 157. It is held that the vendee is not bound to accept goods in a closed cask, which the vendor refuses to open.—Isherwood vs. Whitmore, 10 M. & W., p. 757; 11 M. & W., p. 347. Nor if the seller refuse to let him compare the sample with the bulk.—Lorymer vs. Smith, 1 B. & C., p. 1. Nor to remain at his place of business after sunset on the day fixed for delivery.—Startup vs. McDonald, 6 M. & G., p. 593. Nor to select the goods out of a larger quantity.—Dixon vs. Fletcher, 3 M. & W., p. 146; Hart vs. Mills, 15 M. & W., p. 85.

1786. The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition. Rights in case of breach of warranty.

NOTE.—"Agreement for sale."—Barker vs. Palmer, 4 B. & Ald., p. 387; see Muller vs. Eno, 14 N. Y., pp. 597, 610. "Executed sale." There has been much doubt upon this point, but it is now settled that a warranty is not presumptively a condition.—Kiernan vs. Rocheleau, 6 Bosw., p. 148; Voorhees vs. Earl, 2 Hill, p. 288; Thornton vs. Wynn, 12 Wheat., p. 183; Street vs. Blay, 2 B. & Ad., p. 456; Gompertz vs. Denton, 1 Cr. & M., p. 207; Parsons vs. Sexton, 4 C. B., p. 907;

see *Muller vs. Eno*, 14 N. Y., p. 597; *Behn vs. Burness*, 1 Best & Sm., p. 877. "Unless," etc.—*Bannerman vs. White*, 10 C. B. (N. S.), p. 844.

CHAPTER IV.

SALE BY AUCTION.

- SECTION 1792. Sale by auction, what.
 1793. Sale, when complete.
 1794. Withdrawal of bid.
 1795. Sale under written conditions.
 1796. Rights of buyer upon sale without reserve.
 1797. By bidding.
 1798. Auctioneer's memorandum of sale.

Sale by
 auction,
 what.

1792. A sale by auction is a sale by public outcry to the highest bidder on the spot.

NOTE.—Mr. Story defines a sale by auction to be: "A public sale where goods are offered to be taken by the highest bidder."—Story on Sales, Sec. 460.

Sale, when
 complete.

1793. A sale by auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold.

NOTE.—Benjamin on Sales, p. 354; Story on Sales, Sec. 461.

With-
 drawal
 of bid.

1794. Until the announcement mentioned in the last section has been made, any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.

NOTE.—Until the final consent of both parties is signified by the fall of the hammer, or any other customary manner, there are only mutual propositions, but no mutual agreement to any definite proposition. *Payne vs. Cave*, 3 T. R., p. 148; *Routledge vs. Grant*, 4 Bing., p. 653; *Cook vs. Oxley*, 3 T. R., p. 654; Story on Sales, Sec. 461. At any time before final consent, either party may retract, but the retraction must be made so loud as to be heard by the other.—*Jones vs. Nanney*, 11 Price, p. 103; Story on Sales, Sec. 461. "But," says Mr. Story (Sec. 461), "as soon as the

hammer is struck down, which is the typical notification by the seller that the offer of the buyer is accepted, the bargain is considered as concluded, and the seller has no right afterward to accept a higher bid, nor the buyer afterward to withdraw from the contract. The buyer may, however, when the hammer is struck down and the terms of sale proclaimed, refuse on the spot to be bound by the sale, if they be contrary to his understanding of them; but if he remain silent, his assent is necessarily implied."

1795. When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit.

Sale under
written
conditions.

NOTE.—Shelton vs. Livius, 2 Cr. & J., p. 411; Gunnis vs. Exhart, 1 H. Black, p. 289; Powell vs. Edmunds, 12 East, p. 6; Slack vs. Highgate Archway Co., 5 Taunt., p. 792; Bradshaw vs. Bennet, 5 Car. & Payne, p. 48. The oral declarations may, however, be proven, to show fraud.—Id.; and Story on Sales, Sec. 463.

1796. If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void.

Rights of
buyer
upon sale
without
reserve.

NOTE.—Warlow vs. Harrison, 28 L. J., Q. B., p. 18; 1 E. & E., p. 295; 29 L. J., Q. B., p. 14; Benjamin on Sales, pp. 353, 354.

1797. The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer, which entitles him to rescind his purchase.

By bidding.

NOTE.—Story on Sales, Sec. 482; Sugden on Vendors, pp. 18, 19; Benjamin on Sales, p. 357; Green vs.

Baverstock, 14 C. B. (N. S.), p. 204; Crowder vs. Austin, 3 Bing., p. 368; Rex vs. Marsh, 3 Y. & J., p. 331; Howard vs. Castle, 6 T. R., p. 642; Wheeler vs. Collier, Moo. & M., p. 126; Baham vs. Bach, 13 La., p. 287; Moncrieff vs. Goldsborough, 4 Harr. & McH., p. 282; Donaldson vs. M'Roy, 1 P. A. Browne, p. 346; Thornett vs. Haines, 15 M. & W., p. 371; but see Woodward vs. Miller, 2 Colly, p. 279; Bramley vs. Alt, 3 Ves., p. 619n.; Smith vs. Clarke, 12 Ves., p. 477. This rule is sustained in all its stringency, by Chancellor Kent.—2 Kent Com., p. 539.

Am

Auctioneer's memorandum of sale.

1798. When property is sold by auction, the auctioneer, or his partner or clerk, may enter in a sale book, at the time of the sale, a memorandum specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer. A memorandum thus made binds both the parties in the same manner as if made by themselves.

NOTE.—See note to Sec. 1739; Story on Sales, Secs. 465, 466, 467, 468, 469; Benjamin on Sales, p. 83.

We cannot leave this branch of our work without an acknowledgment of our indebtedness for much that is contained in the notes to the recent and very valuable work on Sales of Personal Property, by Mr. Judah P. Benjamin, late of the American Bar, and now of Lincoln Inn, Barrister at Law.

TITLE II.

EXCHANGE.

SECTION 1804. Exchange, what.

1805. Form of contract.

1806. Parties have rights and obligations of sellers and buyers.

1807. Warranty of money.

Exchange, what.

1804. Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.

1805. The provisions of Sec. 1739 apply to all exchanges in which the value of the thing to be given by either party is two hundred dollars or more.

Form of contract.

1806. The provisions of the Title on Sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.

Parties have rights and obligations of sellers and buyers.

1807. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Warranty of money.

NOTE.—Timmins vs. Gibbins, 18 Q. B., p. 722;
Young vs. Cole, 3 Bing. N. C., p. 724.

TITLE III.

DEPOSIT.

- CHAPTER I. *Deposit in General.*
 II. *Deposit for Keeping.*
 III. *Deposit for Exchange.*

CHAPTER I.

DEPOSIT IN GENERAL.

- ARTICLE I. NATURE AND CREATION OF DEPOSIT.
 II. OBLIGATIONS OF THE DEPOSITARY.

ARTICLE I.

NATURE AND CREATION OF DEPOSIT.

- SECTION 1813. Deposit, kinds of.
 1814. Voluntary deposit, how made.
 1815. Involuntary deposit, how made.
 1816. Same.
 1817. Deposit for keeping, what.
 1818. Deposit for exchange, what.

Deposit,
kinds of.

1813. A deposit may be voluntary or involuntary; and for safe keeping or for exchange.

NOTE.—In Edwards on Bailments, p. 47, it is said that “when chattels are delivered by one man to another to keep for the use of the *bailor* it is called a deposit; the essential characteristic of the contract is, that the keeping be gratuitous.”—Code of La., Art. 2900; Story on Bailments, Secs. 4–41; 2 Kent’s Com., p. 560. In Hilliard on Torts, 2 Vol., p. 523, Sec. 3, it is said, that *depositum* is a *deposit* “without compensation or reward.”—1 Pars. on Con., p. 572; McKay vs. Draper, 27 N. Y. (13 Smith), p. 256. In Hyatt vs. Argente, 3 Cal., p. 151, it was held “that one depositing securities to secure the payment of a debt or advancement thereon may agree that they may be sold at the option of the creditor, and that drafts upon the bailee, directing the payment thereof ‘from the proceeds of the securities in his hands,’ ” gave authority to sell the deposited securities to meet the drafts. And an order to pay, “when in funds from the proceeds,” is conclusive that other sales were to be made, and that a sale under such authority is good, without previous demand of payment or notice of the time and place of sale. “When personal property is pledged, mortgaged, hypothecated, or placed in trust upon terms and conditions, Courts of law will be governed by the language of the contract.” When the contract is absolute on its face, the party asserting a condition or limitation must show it. A bailee who disclaims his relation to the bailor cannot claim the right to require a demand for the money before interest is charged against him.—Dickinson vs. Owen, 11 Cal., p. 71. In the case of a stakeholder, see Hardy vs. Hunt, 11 Cal., p. 343. When bailor’s possession is obtained by fraud bailee may set up title in a third party against an action by bailor for the subject of the bailment.—Hayden vs. Davis, 9 Cal., p. 573. Warehouseman’s statement to one about to take possession of goods in his possession by process that he has no charges on the goods is a waiver of the warehouseman’s lien for charges.—Blackman vs. Pierce, 23 Cal., p. 508. Removal of goods from place agreed upon for them to be kept charges bailee with damages done, etc. St. Laskey vs. Davidson, 6 Cal., p. 643. The conversion of property found, without first making proper inquiry for the owner, is larceny.—Sec. 485 Penal Code, Cal. This note is upon the subject of bailment in general.

1814. A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary.

Voluntary
deposit,
how made.

NOTE.—See note to Sec. 1815, post. The finder of personal property is not compelled by law to take the same into his custody, but if he *voluntarily* assumes the charge of it the law imposes on him the duties of a depositary, so far, at least, that he is answerable for gross negligence.—Ed. on Bailm., p. 55. “Finder.”—Story on Bailm., Secs. 86, 87; *Corey vs. Little*, 6 N. Hamp., p. 213. In the civil law a voluntary deposit is where no such necessity exists for depositing as in making an *involuntary* deposit, but rests in consent or agreement.

1815. An involuntary deposit is made:

1. By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner; or,

Involun-
tary
deposit,
how made.

2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.

NOTE.—Edwards on Bailm., p. 47, Chap. 2, says: “An involuntary deposit is a delivery of goods usually made under an emergency, such as shipwreck, fire, or flood, which leaves to the owner of them no time for deliberation or choice.” He also says, that at the civil law, “sequestration,” or the delivery of goods or property under a judicial order, or a deposit with an indifferent person, made by agreement of contestants, to await event of suit, to be delivered to successful party. Responsibility is not changed so long as it remains a naked deposit without reward.—Code La., Art. 2942; Story on Bailm., Sec. 46; 2 Hilliard on Torts, p. 523, Sec. 4. “A depositary is liable only for gross negligence, which is a question of fact for the jury.”—*Dorman vs. Jenkins*, 2 Add. & Ell., p. 256; *Jourdan vs. Reed*, 1 Clarke, Iowa, p. 135. In case of *finding* property, the standard of gross negligence is applied.—*Dougherty vs. Poregate*, 3 Clarke, Iowa, p. 88. Gross negligence is held equivalent to fraud.—*Tudor vs.*

Lewis, 3 Met., Ky., p. 378. Deposit of bank bills with a banking company, unless special, creates a debt, not a bailment.—Woaz vs. Tuskegee, etc., 34 Ala., p. 58. Receiving claims to collect, though without compensation, requires the one so receiving to use ordinary diligence.—Moore vs. Gholson, 34 Miss., p. 372. What care must be taken considered.—1 Pars. on Cont., p. 574; The William, 6 Rob. Adm., p. 316; 1 Pars. on Cont., p. 578. Right of possession sustains trover, but right of property must exist to sustain replevin; all which actions are under our "Practice Code" brought for "claim and delivery of personal property." At the civil law an involuntary deposit is called a necessary deposit, because the relation and contract is implied from pressing necessity.—La. Civ. Code, Sec. 2935.

Same.

1816. The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it, if able to do so.

NOTE.—It is laid down in Ed. on Bailm., p. 47, that "the person receiving the goods to keep, impliedly stipulates that he will take some degree of care of them; but the degree of care is to be measured by the watchfulness with which he preserves his own property of a like kind." Foster vs. The Essex Bank, 17 Mass., p. 479: "He must observe good faith in keeping them as he keeps his own property.—See, also, 2 Hilliard on Torts, p. 524, §§ 5, 6; Jenkins vs. Melow, 1 Sneed, p. 248. Liable for gross negligence only.—See Lampley vs. Scott, 24 Miss., p. 528; Choteau vs. Steamboat Co., 20 Miss., p. 519; Kemp vs. Farlow, 5 Ind., p. 462; Dart vs. Lowe, 5 Ind., p. 131; 17 Ill., p. 170; Connor vs. Winton, 8 Ind., p. 315. It is a fact to be determined by the jury under all the circumstances of the case.—McNabb vs. Lockhart, 18 Geo., p. 495.

Deposit
for safe
keeping,
what.

1817. A deposit for keeping is one in which the depositary is bound to return the identical thing deposited.

NOTE.—A person receiving the goods to keep without recompense, and he in good faith keeps them as his own, is not answerable for their loss or injury. As he receives no benefit from the bailment, he is responsible only for bad faith or gross neglect.—See Bouvier L. Dict., Title "Bailment," p. 3. Ed. on Bailm., p. 35, gives Sir Wm. Jones' definition: "A delivery of goods in trust

on a contract, express or implied, that the trust shall be duly executed and the goods redelivered as soon as the time, or the use for which they were bailed, shall have elapsed or be performed."—Jones on Bailm., p. 117. The deposit of the text is a "special deposit," treated and illustrated at length.—Ed. on Bailm., pp. 66-74. If not guilty of gross negligence, the depositary is not responsible for any accident which occurs, for his agreement is to *keep* the bailment, and not to keep it *safely*.—Story on Contracts, p. 731, Sec. 691. If it is stolen he is not responsible unless it is stolen through his own gross neglect. *Idem*.—Coggs vs. Bernard, 2 Lord Ryan, p. 909; The King vs. Hertford, 2 Show., p. 172; Brook Abr., Title Bailment, p. 7; Story on Bailm., pp. 72, 73, 74, 190; Montith vs. Bissell, Wright (O.) R., p. 411; 1 Daim. Abr., Ch. 17, Art. 7; Nelson vs. McIntosh, 1 Stark, p. 238. The specific thing must be restored which was deposited, if not, it is a bailment of a different character.—Story on Cont., p. 729, § 689; Robinson vs. Ward, Ry. & Mood., p. 276; Wren vs. Kitson, 11 Ves. R., p. 377. The *identical* thing deposited must be returned as nearly as possible in the condition in which it was received.—Story Cont., p. 734, § 696.

1818. A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited.

Deposit for
exchange,
what.

NOTE.—The deposit of the text is in the nature of a general deposit, and creates a debt rather than a bailment. Money deposited in a bank which mingles with other moneys there kept becomes a debt to be recovered with interest.—See Ed. on Bailm., p. 66. See, also, Sec. 1878, and note, post.

ARTICLE II.

OBLIGATIONS OF THE DEPOSITARY.

SECTION 1822. Depositary must deliver on demand.

1823. No obligation to deliver without demand.

1824. Place of delivery.

1825. Notice to owner of adverse claim.

1826. Notice to owner of thing wrongfully detained.

1827. Delivery of thing owned jointly, etc.

1822. A depositary must deliver the thing to the

Depository
must
deliver on
demand.

person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by Section 1825.

NOTE.—The depository must deliver the thing deposited to the person for whose benefit it was deposited, on demand, whether for specified time or not. Obviously, the depository has no interest in the prolongation of the deposit, and therefore has no right to insist upon it. He may be entitled to compensation for the whole period originally agreed upon, but that is another matter. If he has a lien on the article or thing, or if there is another claiming to be owner, he may refuse, if forbidden, etc.—*Bates vs. Stanton*, 1 Duer, p. 79; *Hardman vs. Wilcock*, 9 Bing., p. 378; *King vs. Richards*, 6 Whart., p. 418. In other cases the depository cannot dispute his depositor's title.—See *Marvin vs. Ellwood*, 11 Paige, pp. 365, 376; *Gosling vs. Birney*, 6 Bing., p. 339; *Hall vs. Griffin*, 10 id., p. 246; *Kiernan vs. Sanders*, 6 Ad. & El., p. 516. Or if the law so directs or claims possession otherwise.—*Bliven vs. Hudson River R. R. Co.*, 35 Barb., p. 188; see *Stamford Steamboat Co. vs. Gibbons*, 9 Wend., p. 327; *Edson vs. Weston*, 7 Cow., p. 278. Depository must give prompt notice to depositor of proceedings adverse to his interests.—*Scranton vs. Farmers' and Mech. Bk.*, 24 N. Y., pp. 424, 427, by Sutherland, J.; see "Redelivery," Ed. on Bailm., p. 83.

No
obligation
to deliver
without
demand.

1823. A depository is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time.

NOTE.—See *Phelps vs. Bostwick*, 22 Barb., p. 314; *Downes vs. Phoenix Bank*, 6 Hill, p. 297; *Brown vs. Cook*, 9 Johns., p. 361, on the question of demand and term deposits. Demand and refusal, effect of.—Ed. on Bailm., p. 87. Refusal after demand is a conversion, etc. After demand bailee answerable for loss.—Id., pp. 87, 88; *Brown vs. Hotchkiss*, 9 Johns. R., p. 361; *May vs. Hawes*, 13 East, p. 197; *Sargeant vs. Gile*, 8 N. Hamp. R., p. 325; *Armory vs. Delamire*, 1 Str., p. 504; *Fisher vs. Cobb*, 6 Vt. Rep., p. 622; *Sutton vs. Buck*, 2 Taunt. R., p. 302; *Miller vs. Adsit*, 16 Wend., p. 335; *White vs. Webb*, 15 Conn., p. 302.

Goods must be redelivered to depositor, even though he is servant only of the owner. Until notice and demand charges him otherwise, this is the principle of the civil law.—Code of La., Art. 2921. If the goods are found to be stolen, and the owner being notified to claim and take and does not, bailee exonerated. If he does not deliver on proper demand he is responsible.—Story on Cont., Sec. 696; *Nicholson vs. Chapman*, 2 H. Bl., p. 254.

1824. A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him. Place of delivery.

NOTE.—If the contract does not specify a place where the deposit must be restored, it is to be restored at the place where such deposit has been made, and it must be restored as soon as it is demanded, even though the time for its restoration stipulated for has not arrived. Depositary may not retain the deposit for debt, but may for advances made by him arising from the deposit.—Code of La., Arts. 2920 to 2927. A failure to deliver at the time and place stipulated, makes the bailee liable for conversion in the value of the article.—See note and authorities to preceding section, and Ed. on Bailm., p. 88; Story on Cont., p. 763, Sec. 698; *Hook vs. White*, 36 Cal., p. 299.

1825. A depositary must give prompt notice to the person for whose benefit the deposit was made, of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him. Notice to owner of adverse claim.

NOTE.—*Scranton vs. Farmers' and Mech. Bk.*, 24 N. Y., p. 424. "It may be asked," says Story on Bailments, Sec. 110, "what is to be done by a bailee where different persons claim the same thing from him under different facts." In answer to this it is said, *id.*, that the parties, by interpleader, may be compelled to litigate under cases cited in Note 5, *id.*, Sec. 110. But when the parties claim in absolutely adverse rights, the bailee must defend himself as best he may, etc. In Sec. 111, Story says: "The bailee, if sued, (may) call upon the proper parties to appear and contest the title between themselves, and thus to exonerate him

from responsibility." Garnishment is here held to be simply a "notice of the suit," by which bailee may compel bailor to defend the suit.—Sec. 111, *id.*

Notice to
owner of
thing
wrongfully
detained.

1826. A depositary, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice.

NOTE.—This section is a modification of 2921 Code La. See, also, Story on Bailm., Secs. 102 to 108, inclusive: "The civil law and the French law coincide in many respects with ours." If the right owner appears, the "*bailee*" may deliver them (the goods) to him. Dig. Lib. 16, Tit. 3, pp. 1, 31, Sec. 1; Ayliffe Pand., B. 4, Tit. 17, p. 522; Code Civil of France, Arts. 1937-8; Pothier, *Traite de Depot*, N. 51; Code of La., Arts. 2905-2920; and especially if they were stolen from the owner. In case of stolen goods, the Code of France requires that the bailee shall give notice to the owner, and if the owner fails to claim the goods in a limited time, he may safely redeliver them to the depositor. Code Civil of France, Art. 1938. The Code of La. adopts the same rule.—See Code La., § 1825, (1867 ed.), Arts. 2920-1; see Sec. 1865, and note, post. The Penal Code of Cal., Sec. 485; one who finds property, etc., and appropriates it, without endeavoring to find the owner, is guilty of larceny.

Delivery
of thing
owned
jointly, etc.

1827. If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof, if it can be done without injury to the thing.

NOTE.—This provision is new, and intended to obviate a difficulty which may sometimes arise. It in fact changes the rule set forth in Edwards on Bailm., p. 85, that "chattels deposited by several joint owners

must be redelivered on the joint demand of the persons making the deposit," and in Story on Bailm., §§ 114-117; Jones on Bailm., p. 51.

CHAPTER II.

DEPOSIT FOR KEEPING.

ARTICLE I. GENERAL PROVISIONS.

II. GRATUITOUS DEPOSIT.

III. STORAGE.

IV. INNKEEPERS.

V. FINDING.

ARTICLE I.

GENERAL PROVISIONS.

SECTION 1833. Depositor must indemnify depositary.

1834. Obligation of depositary of animals.

1835. Obligations as to use of thing deposited.

1836. Liability for damage arising from wrongful use.

1837. Sale of thing in danger of perishing.

1838. Injury to, or loss of thing deposited.

1839. Service rendered by depositary.

1840. Extent of his liability for negligence.

1833. A depositor must indemnify the depositary: Depositor must indemnify depositary.

1. For all damage caused to him by the defects or vices of the thing deposited; and,

2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking.

NOTE.—Story on Bailm., § 121: The depositary is generally entitled to be reimbursed all the necessary expenses to which he has been subjected for the preservation of the deposit. And by the Roman and French law he is entitled to a lien, for all such expenses, upon the deposit, and indemnity for all losses occasioned thereby.—Ayliffe, Pand. B. 4, Tit. 17, pp. 521, 522; 1 Domat., B. 1, Tit. 7, §§ 2, 3, Arts. 1, 2, 3, 14; Pothier Traite de Depot. N., 59, 69, 74; Code La., Arts. 2927-2931; Esk. Inst., B. 3, Tit. 1, § 28; 1 Domat., B. 1, Tit. 16, § 1, Art. 4. Code La., Art. 2931, is as follows:

"He who has made a deposit is bound to reimburse the depositary the money he has advanced for the safe keeping of the thing, and to indemnify him for all that the deposit has cost him. He is to indemnify the depositary for the losses which the thing deposited may have occasioned him." The Roman law inflicts a double compensation for misconduct of the bailee, on the ground that public policy requires this perfidy to be so punished as to suppress temptation to do wrong. Our law only exacts ample compensation for actual injury and loss (Story on Bailm., § 83), but punishes a conversion as a larceny. See Penal Code, Sec. 485.

Obligation
of
depositary
of animals.

1834. A depositary of living animals must provide them with suitable food and shelter, and treat them kindly.

NOTE.—Stable keepers are liable for all losses not arising from inevitable casualty or overwhelming force.—Story on Bailm., § 458; Bell Comm., p. 465 (5th ed.); id. (4th ed.), §§ 398-402, 403; Pothier Pand, Lib. 4, Tit. 9, N. 1-7; Esk. Inst., B. 3, Tit. 1, § 28; Dig. Lib. 4, Tit. 9, 1, pp. 1, 5; 1 Domat. B. 1, Tit. 16, § 1, Art. 4; id., § 2, Art. 1-4. In respect to bailments, originally, carriers and other bailees for him were under the same obligations. A special edict was passed by the Praeter, by which stable keepers (as set forth in the first part of this note), innkeepers, and shipmasters were put under peculiar responsibility, as set out *supra*. The rule of the text is a fair deduction from and is justly comprehended within the general rule applicable to all depositaries, that "every person in such case contracts for reasonable care."—Story on Bailm., p. 90, § 89; Jones on Bailm., pp. 81, 82. In Story on Bailm., § 90, speaking of the "use," and it should be the same rule with "care." "Every case must be governed by its own peculiar circumstances." This being so, we must readily perceive the difference in the care proper and necessary for the preservation of living and animate things and those inanimate. Even ordinary care bestowed upon a bailment would require a compliance with the text. See, also, Story on Bailm., § 140. "If it" (the deposit) "is a living animal, as a horse, suitable food and exercise must be given to it." 2 Hil. on Torts, p. 583, § 4, says an innkeeper's responsibility extends to the care of *animals*.—Mason vs. Thompson, 9 Pick., p. 280. "The man who hires a horse is bound to ride it moderately and treat it as carefully as any man of common discretion

would his own, and to supply it with suitable food."—Ed. on Bailm., p. 312. How much more care should then be bestowed by one *paid to keep* the animal. Agister of cattle responsible for loss on proof of want of ordinary care.—*Rey vs. Tony*, 24 Miss., p. 600; *Swann vs. Brown*, 6 Jones, p. 150, responsibility of livery stable keeper.

1835. A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity.

Obligations
as to use
of thing
deposited.

NOTE.—As a general rule, "it may be laid down that the depositary has no right to use the thing deposited, unless there be an express or implied consent on the part of the depositor." This is the clear result of the Roman, French, and Louisiana law, and also of ours.—Story on Bailm., Sec. 89; and Notes 3, 4, 5. The difference in the use of a horse, cow, or other living thing requiring a certain amount of use or exercise, may be implied, so as to bestow on it the proper care; but this would not be implied as to inanimate things, such as diamonds and the like. Cases are governed by particular circumstances.—See, also, Code La., Art. 2911. In Story on Bailm., Sec. 92, it is said, "that it is a gross breach of trust which gives to the injured party a just cause of action for a bailee to break open a locked chest or a sealed package which is deposited with him."—Code of La. (1825), Art. 2914. It follows that "the depositary has no authority to sell or pledge the deposit; if he does, the owner may reclaim it from any person who is found in possession of it."—Hartop vs. Hoare, 3 Atk., p. 43; S. C., 1 Wils., pp. 8, 9; 2 Str., p. 1187.

1836. A depositary is liable for any damage happening to the thing deposited, during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been thus used.

Liability
for damage
arising
from
wrongful
use.

NOTE.—An obligation is implied, "not only to use the thing with due care and moderation, but also not to apply it to any other use than that for which it is hired."—Story on Bailm., Sec. 413; Pothier Contrat de Louage, n. 189; Pothier Pand., Lib. 19, Tit. 2, n. 28, 29. If a horse is hired as a saddle horse, hirer cannot use

him in a cart, or as a beast of burden. So, if for a journey to a particular place, or for a certain time, the purpose, manner, or time cannot be altered; and if done, hirer responsible, even for an inevitable casualty. These questions fully discussed in Story on Bailm., Sec. 413 to 413d, and notes and cases therein cited; see, also, Edwards on Bailm., pp. 89-92, and notes and cases there cited.

Sale of
thing in
danger of
perishing.

1837. If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor.

NOTE.—“If to save a perishable deposit it has been sold by the bailee, the money is to be paid to the owner; for a necessary sale is good, and for his benefit.”—Story on Bailm., Sec. 97; Pothier Traite de Depot, n. 42, 43, 44.

Injury to,
or loss
of thing
deposited.

1838. If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or willfully misrepresents the circumstances to him, the depositary is presumed to have willfully, or by gross negligence, permitted the loss or injury to occur.

NOTE.—There is no express authority given by authors treating of bailments for this provision, but it seems to be reasonable under the general classification of the acts of persons constituting frauds. *Fraudulent concealment* of the circumstances under which the loss or injury occurred, so far as he has information on the subject, or the *willful misrepresentation* of such circumstances, ought to be as much the subject of an action by the bailor against the bailee as these same grounds are held to be in the dealings of vendors and vendees as laid down in 1 Hilliard on Torts, Secs. 4-6. See the converse rule in Sec. 1840, post, where another reason in support of this text is found in Sec. 77, Story on Bailm. It is said: “If there is a meditated concealment of the contents of a box or casket from the bailee, with a view to induce him to receive it, and he would not have received or exposed it, as he did, had he known the contents, it is a fraud,

or a loss caused by the bailor's own folly or laches, and the bailee would not be held liable for more than the value of the box or casket without the contents." Why should not the bailee be held responsible for his fraud, the same as the bailor?

1839. So far as any service is rendered by a depositary, or required from him, his duties and liabilities are prescribed by the Title on Employment and Service.

Service rendered by depositary.

Am NOTE.—See Title VI, Part IV, Div. III, ante.

1840. The liability of a depositary for negligence is limited to the amount which he is informed, or has reason to suppose, the thing deposited to be worth.

Extent of his liability for negligence.

NOTE.—See § 77, Story on Bailm., classifying responsibility: 1. Where bailee knew contents of box or casket though bailor kept the key.—Jones on Bailm., pp. 38, 39. 2. If he had no ground to suppose the box or casket contained valuables.—Jones on Bailm., §§ 38, 39. 3. Where bailor meditatedly concealed contents.—Jones on Bailm., §§ 38, 39. See, also, note to Sec. 1838, as to the third ground.

ARTICLE II.

GRATUITOUS DEPOSIT.

SECTION 1844. Gratuitous deposit, what.

1845. Nature of involuntary deposit.

1846. Degree of care required of gratuitous depositary.

1847. His duties cease, when.

1844. Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited.

Gratuitous deposit, what.

NOTE.—A "mandatum," or as Sir Wm. Jones denominates it, "mandate," may be said to be what is here designated a "gratuitous deposit." Mandate is defined in Story on Bail., § 137, to be "a bailment of goods without reward, to be carried from place to place, or to have some act performed about them," and refers to Jones on Bailm., p. 117. 2 Hilliard on Torts, p. 524, defines "mandate" as a "gratuitous commission wherein the mandatary agrees to do something

with or about the thing bailed," and refers to 1 Pars. on Cont., p. 572; Lloyd vs. Barden, 3 Strobh., p. 343. Vol. 2 Kent's Com. (O. S.), p. 568; Story Com., § 140, here the service and labor are the principal objects of the parties, the thing is merely accessorial.—McMahon vs. Sloan, 12 Penn., p. 229. In each contract "mandate" and "deposit," or as we term it "gratuitous deposit," there are like essentials; in each "there is custody and labor and service to be performed." The true distinction between them is, that in case of a deposit the principal object of the parties is the custody of the thing, and the service and labor are mere accessorial; in the case of a mandate, the labor and services are the principal objects of the parties, and the thing is merely accessorial. Philosophically, or even technically, it may be doubted whether this distinction really exists.—Jones on Bailm., p. 53.

Nature of
involun-
tary
deposit.

1845. An involuntary deposit is gratuitous, the depositary being entitled to no reward.

NOTE.—See Sec. 1815, and note, ante.

Degrees of
care
required of
gratuitous
depositary.

1846. A gratuitous depositary must use, at least, slight care for the preservation of the thing deposited.

NOTE.—See Secs. 1813–1815, and notes, ante.

His duties
cease,
when.

1847. The duties of a gratuitous depositary cease:

1. Upon his restoring the thing deposited to its owner; or,

2. Upon his giving reasonable notice to the owner to remove it, and the owner failing to do so within a reasonable time. But an involuntary depositary, under Subdivision 2 of Section 1815, cannot give such notice until the emergency which gave rise to the deposit is past.

NOTE.—See Secs. 1813, 1815, and 1816, ante, and notes; Roulston vs. McClelland, 2 E. D. Smith, p. 60.

ARTICLE III.

STORAGE.

SECTION 1851. Deposit for hire.

1852. Degree of care required of depositary for hire.

SECTION 1853. Rate of compensation for fraction of a week, etc.

1854. Termination of deposit.

1855. Same.

1851. A deposit not gratuitous is called storage. Deposit
for hire.
The depositary in such case is called a depositary for hire.

NOTE.—See subject discussed fully in Story on Bailm., Chap. 6, Sec. 363, et seq., and the various appellations given to the bailee for hire, here called "depositary for hire."

1852. A depositary for hire must use at least ordinary care for the preservation of the thing deposited. Degree
of care
required of
depositary
for hire.

NOTE.—The hiring of the text is where the bailee has in his keeping goods about which he is to do something for which he is to receive compensation from the owner or bailor, and this bailee is a depositary for hire, and of the thing had he is obliged to take ordinary care. 2 Hilliard on Torts, Chap. 44, Sec. 8, says: "Ordinary diligence means that degree of care, attention, and exertion which under the circumstances a man of ordinary prudence and discretion would exercise in reference to the particular thing were it his own; or which the generality of mankind use in keeping their own goods of the same kind." Numerous instances are given by this author of the care the bailee is to give, and his responsibility for neglecting the bailment.—See note to Sec. 8, supra, for the following cases:

NEGLECTENTLY RECEIVING GOODS.—Not directed to the bailee receiving.—Newhall vs. Paige, 10 Gray, p. 366. Warehousemen are under the general rule of the text.—See 2 Hilliard on Torts, Chap. 27, Secs. 10, 11, and notes and cases there cited.

BOAT FOR REPAIRS.—Injured by ice, from careless launching.—Smith vs. Meegan, 22 Miss., p. 150.

RETURN OF CHATTEL.—Under agreement for good order, destruction by irresistible force excuses.—McEvers vs. Steamboat, etc., 22 Miss., p. 187.

AGISTER OF CATTLE.—Responsible for loss only on proof of want of ordinary care.—Rey vs. Tony, 24 Miss., p. 600.

MILLER HAVING CORN.—Without notice liable for ordinary care.—Spangler vs. Eicholtz, 25 Ills., p. 297.

CUSTOMS OFFICER.—Restraint, not possession, while goods in bonded warehouse, but is in possession of owner

or warehouse owner as his agent.—Cartwright vs. Wilmerding, 24 N. Y., 10 Smith, p. 521.

WATCHMAKER.—To use ordinary care in safe keeping of watch left for repair.—Halyard vs. Dechelman, 29 Miss., p. 459.

LIVERY STABLE KEEPER.—Reponsible for carelessly permitting one customer to do acts by which the horse of another is lost.—Swann vs. Brown, 6 Jones, p. 150.

LESSEE OF FURNITURE.—Not liable for loss by fire, under clause of "reasonable use and wear" excepted. ♦ This does not change the rule of the law of bailments.—Hyland vs. Paul, 33 Barb., p. 241. See, also, notes to Secs. 1813, 1834, 1835. ●

Rate of compensation for fraction of a week, etc.

1853. In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half month.

NOTE.—This is believed to be the ordinary or general rule or usage, and is made *the rule* to prevent misunderstandings or misapprehensions.

Termination of deposit.

1854. In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary upon reasonable notice.

NOTE.—As one of the means of terminating the deposit, we may instance that when a guest pays his bill the innkeeper's liability ceases. Any comprehensive act indicating a discontinuance on the part of the depositor, or actual notice, reasonable as to time and circumstances, by the depositary to depositor, terminates the deposit. But if a guest goes away for a short time, leaving his property and intending to return, the innkeeper is liable for the loss of his property during his absence.—McDonald vs. Edgerton, 5 Barb., p. 560.

Same.

1855. Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on pay-

ing all that would become due to the depositary in case of the deposit so continuing.

NOTE.—The purpose of receiving the deposit by the depositary being the compensation he was to obtain for *keeping* it, which being fully paid by the depositor, his contract is ended, and the depositary having no further interest in the thing deposited, it is under the law of bailments manifestly just that the depositor retake the deposit.

ARTICLE IV.

INNKEEPERS.

SECTION 1859. Innkeeper's liability.

1860. How exempted from liability.

1859. An innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.

Innkeeper's liability.

NOTE.—An innkeeper is an insurer, and liable for all losses (*Gile vs. Libby*, 36 Barb., p. 70; *Chute vs. Wiggins*, 14 Johns., p. 175), as in case of fire (*Hulett vs. Swift*, 42 Barb., p. 230) or injuries (*Washburn vs. Jones*, 14 Barb., p. 193; *Shaw vs. Berry*, 31 Me., p. 478; *Dawson vs. Chamney*, 5 Q. B., p. 164) of or to personal property of his guests (*Ingolsbee vs. Wood*, 36 Barb., p. 452; *Hursh vs. Byers*, 29 Mo., p. 469; *Ewart vs. Stark*, 8 Rich. L., p. 423; *Grinnell vs. McCook*, 3 Hill, p. 485; *Wintermate vs. Clarke*, 5 Sandf., p. 242; *Gelley vs. Clerk*, Cro. Jac., p. 188; see *Washburn vs. Jones*, 14 Barb., p. 193; *McDonald vs. Edgerton*, 5 id., p. 560; *Berkshire Woolen Co. vs. Proctor*, 7 Cush., p. 417) "Placed under his care."—*McDonald vs. Edgerton*, 5 Barb., p. 560; *Piper vs. Manny*, 21 Wend., p. 282; *Clute vs. Wiggins*, 14 Johns., p. 175; *Richmond vs. Smith*, 8 B. & C., p. 9; *Burgess vs. Clements*, 4 M. & Selw., p. 306. The innkeeper is not responsible for goods which are not, in any proper sense, under his charge.—*Farnworth vs. Packwood*, 1 Stark., p. 249; *Sneider vs. Geiss*, 1 Yeates, p. 34; *Hawley vs. Smith*, 25 Wend., p. 642; see *Burgess vs. Clements*, 4 M. & Selw., p. 306. "Unless the cause is irresistible and su-

perhuman." The liability of an innkeeper is regarded as the same as that of a common carrier, according to the weight of American authority.—*Hulett vs. Swift*, 42 Barb., p. 230; *Piper vs. Manny*, 21 Wend., p. 282; *Clute vs. Wiggins*, 14 Johns., p. 175; *Shaw vs. Berry*, 31 Me., p. 478; *Mateer vs. Brown*, 1 Cal., p. 221; see *McDonald vs. Edgerton*, 5 Barb., p. 560; *Richmond vs. Smith*, 8 B. & C., p. 9. To the contrary, see *Merritt vs. Claghorn*, 23 Vt., p. 177; *Dawson vs. Chamney*, 5 Q. B., p. 164. "By negligence of the owner."—*Purvis vs. Coleman*, 21 N. Y., p. 111; *Armistead vs. Wilde*, 17 Q. B., p. 261; *Burgess vs. Clements*, 4 M. & Selw., p. 306; *Fowler vs. Dorlon*, 24 Barb., p. 384. "Or the act of one who brought him to the inn."—*Calye's Case*, 8 Co. Rep., p. 32; *Red. on Carr.*, etc., Sec. 595, and Note 1. *McDaniels vs. Robinson*, 26 Vt., pp. 316-335, fixes an innkeeper's responsibility as follows: He is presumptively "*responsible for all injuries happening to the goods of his guests, and by them intrusted to his care*," and that he cannot exonerate himself except by showing that he did all to insure their safety which it was in his power to do, and there was no default of his servants or guests. An innkeeper is one who, without previous agreement as to time or terms, receives as guests all who visit his house.—*Mateer vs. Brown*, 1 Cal., p. 221; *Carter vs. Hobbs*, 12 Mich., p. 52. The burden of proof is on the innkeeper to show that the loss or injury occurred without his fault.—*Johnson vs. Richardson*, 17 Ill., p. 302. "In other words," says *Hilliard on Torts*, Vol. 2, Chap. 45, p. 529, § 1, "an innkeeper is liable for damages happening in his inn to the goods of his guest, unless it is caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest." A different understanding may of course be had by agreement or a special contract, but only in such cases as the law recognizes or provides for common carriers to stipulate against their own negligence. See note to Sec. 2168, post.

How
exempted
from
liability.

1860. If an innkeeper keeps a fireproof safe, and gives notice to a guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as

his own acts contribute thereto, for any loss of or injury to such articles, if not deposited with him, and not required by the guest for present use.

NOTE.—This section affords an opportunity for innkeepers, by their own acts, to relieve themselves to a certain extent from what might be termed the extreme stringency of the rule in the text of the preceding section, and from the rigor with which it was always enforced, as seen from the decisions quoted there. This means of defense is afforded by and rests alone in the statute. The cases of *Purvis vs. Coleman*, 1 Bosw., p. 322; 21 N. Y. (7 Smith), p. 111, and *Gile vs. Libby*, 36 Barb., p. 70, are on this point.

ARTICLE V.

FINDING.

SECTION 1864. Obligation of finder.

- 1865. Finder to notify owner.
- 1866. Claimant to prove ownership.
- 1867. Reward, etc., to finder.
- 1868. Finder may put thing found on storage.
- 1869. When finder may sell the thing found.
- 1870. How sale is to be made.
- 1871. Surrender of thing to the finder.
- 1872. Thing abandoned.

1864. One who finds a thing lost is not bound to take charge of it, but if he does so he is thenceforward a depositary for the owner, with the rights and obligations of a depositary for hire.

Obligation
of finder.

NOTE.—This section, and some of the ensuing ones, differ materially from the common law, under which the finder is a gratuitous depositary. Mr. Justice Story considered the law in this respect to be unsatisfactory, and it has been altered, giving the finder a reward and holding him to a corresponding accountability. This is more just to both parties. "One who finds a thing lost is not bound to take charge of it," etc.—See *Isaac vs. Clarke*, 2 Bulst., p. 306; *Edw. on Bailm.*, p. 55, Title "Finder;" *Story on Bailm.*, §§ 86, 87, Chap. 2. The doctrine laid down (1 *Bacon's Abridg. Bailment*, D) is very unsatisfactory. Surely, a thing may be lost without any negligence of the owner; and if the owner

is negligent in losing it, it furnishes no very good reason why the finder should apologize for his own negligence by setting up that of the owner (see Sec. 1814 and note, ante).—Edw. on Bailm., Title "Finder," p. 55. Finder put to may recover necessary expense.

Finder to
notify
owner.

1865. If the finder of a thing knows or suspects who is the owner, he must, with reasonable diligence, give him notice of the finding; and if he fails to do so, he is liable in damages to the owner, and has no claim to any reward offered by him for the recovery of the thing, or to any compensation for his trouble or expenses.

NOTE.—This provision is manifestly just, and accords with the requirement of notice in Sec. 1825, ante. It is furthermore in strict conformity with Part III, Title VII, Chap. VI, of the Political Code Cal., and particularly Sec. 3136 thereof. The Penal Code of California, by Sec. 485, punishes one finding and appropriating lost property without an effort to find the owner, under certain circumstances, as guilty of larceny. See, also, Edw. on Bailm., Title "Finder," p. 55.

Claimant
to prove
ownership.

1866. The finder of a thing may, in good faith, before giving it up, require reasonable proof of ownership from any person claiming it.

NOTE.—Edw. on Bailm., p. 55, Title "Finder;" see, also, Story on Bailm., § 108. If the ownership was doubtful or the right was disputed, the depositary might detain the property until the right was ascertained, and in this case he acts as a judicial depositary or sequestrator. See note to preceding section, referring to Political Code, Art. I, Chap. II, Sec. 3136, et seq., as to proof of ownership.

Reward,
etc., to
finder.

1867. The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it.

NOTE.—See provisions of the Political Code referred to supra in this Article, as to compensation; Story on Bailm., § 121. The depositary is generally entitled to be reimbursed all necessary expenses to which he has been subjected for the preservation of the deposit, and

the Roman and French law gave indemnity for all damages occasioned by the deposit. At common law he may rightfully claim and recover all such.—§ 121*a*, *id.*; *Nicholson vs. Chapman*, 2 H. Bl., p. 254.

1868. The finder of a thing may exonerate himself from liability at any time by placing it on storage with any responsible person of good character, at a reasonable expense.

Finder may put thing found on storage.

NOTE.—It does not seem just to compel the finder to keep the property in his own charge. On the other hand, he should not be allowed to put the loser to unnecessary expense. In *Story on Bailm.*, § 85 (in referring to *Doct. & Stud. Dial.*, 2 Ch., p. 38, *St. German*, it is said: "If (the goods found) be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged;" but in § 86 *Story* says this doctrine is very unsatisfactory.—*Musgrave vs. Agden*, *Owen R.*, p. 141; 2 *Ld. Raym.*, p. 909, per *Gould, J.*; *Noy Maxims*, Chap. 43, p. 92. Use of the found article makes the finder liable for injuries to it, but non-use relieves him to a great extent. Storage is a way in which an owner might reasonably dispose of his goods not in use.

1869. The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot, with reasonable diligence, be found, or, being found, refuses upon demand to pay the lawful charges of the finder, in the following cases:

When finder may sell the thing found.

1. When the thing is in danger of perishing, or of losing the greater part of its value; or,
2. When the lawful charges of the finder amount to two thirds of its value.

NOTE.—This provision is new, and somewhat extends the powers of the finder of lost goods, as set forth in Art. I, Chap. VI, Title VII, Part III, Political Code. "Lost money and goods."—Sec. 3136, et seq.

1870. A sale under the provisions of the last section must be made in the same manner as the sale of a thing pledged.

How sale is to be made.

NOTE.—For the rules governing such a sale, see the Chapter on Pledge; see, also, note to preceding section.

Surrender
of thing to
the finder.

1871. The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

NOTE.—This provision cannot be supported by the citation of any positive authority, but seems proper, in order to prevent owners from being made responsible for excessive expenses.

Thing
abandoned.

1872. The provisions of this Article have no application to things which have been intentionally abandoned by their owners.

NOTE.—ABANDONMENT is the relinquishment or surrender of rights or property by one person to another.—Bouvier L. Dict., Vol. 1, p. 18, Tit. Abandonment.

OF RIGHTS.—It implies some act of relinquishment done by the owner without regard to any future possession by himself or any other person, but with an intention to abandon.—Id., and cases cited. Mere *non-user* does not necessarily or usually constitute an abandonment.—10 Pick., p. 310; 23 id., p. 141; *Of a Mining Claim*, 6 Cal., p. 510. Question of abandonment is one of fact.—2 Washburn Real Property, p. 82. An abandonment acted on by another, divests all the owner's rights.—See 6 Cal., p. 510, ante. In *McGoon vs. Ankeny*, 11 Ill., p. 558, it was very properly held that the finder of a thing, which the owner had intentionally thrown away, acquired an absolute title thereto; and it is provided in the Pol. Code Cal., to which reference is made in notes to Secs. 1865–1869, ante, that, in certain events therein set forth, the finder becomes the owner. This is a manifestly just provision, when it is considered that in cases of conversion under certain circumstances, our Penal Code punishes him as for larceny.

CHAPTER III.

DEPOSIT FOR EXCHANGE.

SECTION 1878. Relations of the parties.

Relations
of the
parties.

1878. A deposit for exchange transfers to the depositary the title to the thing deposited, and creates

between him and the depositor the relation of debtor and creditor merely.

NOTE.—Chapman vs. White, 6 N. Y., p. 412; Lund vs. Seamen's Savings Bank, 37 Barb., p. 129; Marsh vs. Oneida Central Bank, 34 id., p. 598; Commercial Bank vs. Hughes, 17 Wend., p. 94; Matter of Franklin Bank, 1 Paige, p. 249.

TITLE IV.

LOAN.

CHAPTER I. *Loan for Use.*

II. *Loan for Exchange.*

III. *Loan of Money.*

CHAPTER I.

LOAN FOR USE.

SECTION 1884. Loan, what.

1885. Title to property lent.

1886. Care required of borrower.

1887. Same.

1888. Degree of skill.

1889. Borrower, when to repair injuries.

1890. Use of thing lent.

1891. Relending forbidden.

1892. Borrower, when to bear expenses.

1893. Lender liable for defects.

1894. Lender may require return of thing lent.

1895. When returnable without demand.

1896. Place of return.

1884. A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use.

Loan,
what.

NOTE.—Commodatum or loan is a gratuitous bailment—though, unlike the forms previously considered

(provided for in this Part), is for the benefit of the bailee and not the bailor.—2 Hil. on Torts, page 525, Chap. 44, Sec. 7. Sir William Jones defines this bailment a “loan for use,” to distinguish it from “mutum,” or loan for consumption.—See Story on Bailm., Sec. 219, and Sir Wm. Jones, p. 64. “Lending for use is a bailment of a thing for a certain time, to be used by the borrower without paying for it.” Mr. Chancellor Kent differs but little from this, but the Civil Law adds, “and then to be specifically returned.” Taking all these definitions together, it is hard to give therefrom clearer understanding than that given in the text.

Title to
property
lent.

1885. A loan for use does not transfer the title to the thing; and all its increase during the period of the loan belongs to the lender.

NOTE.—The loan for consumption, under both the Roman and the common law, constitutes a sale; “but a ‘loan for use’ does not pass the title to the thing bailed.”—2 Kent’s Comm., pp. 573, 574 (3 ed.); referred to, Chap. 4, p. 137, Edwds. Bailm. “The identical property lent must also be returned, together with its increment and gain.” The difference in this from a “mutum” is, that the latter may be returned in kind.—Story on Contracts, Sec. 707, p. 743 (3 ed., 1851). “The thing borrowed is not only to be returned, but everything that is accessorial to it. Thus, the young of an animal born during the time of the loan is to be restored; and the income of stock which has been loaned to the borrower to enable him to pledge it as a temporary security also belongs to the lender.”—Dig., Lib. 13, Tit. 6, pp. 1, 5; Ayliffe, Pand., B. 4, Tit. 16, p. 518; Pothier, Pr. à Usage, n. 73, 74; Jones Bailm., p. 66.

Care
required of
borrower.

1886. A borrower for use must use great care for the preservation in safety and in good condition of the thing lent.

NOTE.—Story on Bailm., § 236, Chap. 4.

OBLIGATIONS OF BORROWER.—To take proper care of the thing borrowed; to use it according to the intention of the lender; to restore it at the proper time; and to restore it in proper condition.—1 Domat., B. 1, Tit. 5, § 2, Art. 1; Pothier, Prêt. à Usage, n. 23. The loan being gratuitous, the borrower, upon the common principles of bailment, is bound to extraordinary dili-

gence, and of course is responsible for slight neglect of the thing loaned. These obligations are increased in their binding force on account of the *loan being for the exclusive benefit of the borrower*. *Under the Civil Law, the ordinary care which one uses regarding his own property is insufficient, but the borrower "ought to exert all possible care," and "is liable not only for a *slight* fault but for the *slightest* fault."—5 Pothier, *Prêt à Usage*, n. 48, 50, pp. 4, 5, 6. Ayliffe, however, uses language much more loose. Whatever care the law requires to be given to the principal thing loaned is to be extended to all which belongs to and goes with it.

1887. One who borrows a living animal for use, Same.
must treat it with great kindness, and provide every-
thing necessary and suitable for it.

NOTE.—If a horse is loaned to a friend for a journey, he must bear the expenses of his food during that journey, and of getting him shod, if he should chance to require it, these being naturally attendant on the use of the horse. Whatever expense the borrower is put to about the loan he must pay himself.—1 Domat, B. 1, Tit. 5, § 3, Art. 4; Pothier *Prêt à Usage*, n. 24, p. 81. This does not extend to extraordinary expenses, such as curing the horse of distemper, and the like.—Story *Bailm.*, § 256, Chap. 4, p. 263. In order to the use of the thing lent, the borrower must pay necessary expense.—Edw. *Bailm.*, p. 163. Not extraordinary, however.—Code La., Arts. 2875, 2879. Also, *id.*, Art. 2869; Story *Contracts*, § 714, p. 747. Ordinary expenses to be paid by borrower. If a horse is lent for a journey, borrower must pay the *expenses of a horse* incident thereto.—§ 273, Story *Bailm.* This fully sustains the text.

1888. A borrower for use is bound to have and to Degree of
skill.
exercise such skill in the care of the thing lent as he
causes the lender to believe him to possess.

NOTE.—Sir Wm. Jones (*Bailm.*, p. 65), is of opinion that the borrower's incapacity to exert more than ordinary diligence will not, even upon the ground of an impossibility, furnish a sufficient excuse for slight neglect; for he contends that the borrower ought to have considered his own capacity before he deluded his friend by engaging in the act of borrowing. Such, also, is the doctrine of Pothier *Prêt à Usage*, n. 49.

But this doctrine, says Story (Bailm., Sec. 237), must be received with qualification and reserve, and confined to cases of engagements, etc. The lender may insist on such diligence only which belongs to the *age, character*, and known habits of the borrower.—Id.

Borrower,
when to
repair
injuries.

1889. A borrower for use must repair all deteriorations or injuries to the thing lent, which are occasioned by his negligence, however slight.

NOTE.—See Story Bailm., Sec. 268, Chap. 4, as to the *state or condition* in which the thing is to be restored. Borrower liable for all injuries, deteriorations by his fault.—Id., p. 269, and authors cited in notes.

BORROWER WHEN EXEMPT FROM LIABILITY.—Edw. Bailm., p. 166, et seq., and cases cited in notes.

Use of
thing lent.

1890. The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending.

NOTE.—THE LOAN, HOW USED.—Edw. Bailm., p. 147; Co. Littleton, p. 52a; 1 Hill's S. C. R., p. 270; Riley vs. Suydam, 4 Barb. S. C. R., p. 222. If George lend a masked habit and jewels to Charles, to be worn by him at a masked ball to be given on a future night, the use must be confined to that particular occasion; and if on the way to or from the place where the ball is held, the borrower is robbed of them at the usual time of going and returning, he will not be answerable for their value; but if he go from the ball to a gaming house with the jewels, he will be responsible if he lose them there by any casualty whatever. The several cases put by Lord Holt, to illustrate this doctrine, are to the same effect.—Coggs vs. Bernard, 2 Lord Raymond, p. 909. So if one lends another a horse to go northward a month, and he go southward, or stays over a month, he is responsible for any accident on the southward journey, or after the expiration of the month. Also, Story Bailm., Sec. 232, Chap. 4. But the right of using the thing bailed is strictly confined to the use, expressed or implied, in the particular transaction. See, also, notes to this section, id.

Relending
forbidden.

1891. The borrower of a thing for use must not part with it to a third person, without the consent of the lender.

NOTE.—Story Bailm., Sec. 234, Chap. 4, p. 238;

Esmay vs. Fanning, 9 Barb., p. 176; 5 How. Pr., p. 228; see *Bringloe vs. Morrice*, 1 Mod., p. 210. Loan is strictly personal, unless consent is given to otherwise use it.

1892. The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expenses he is entitled to compensation from the lender, who may, however, exonerate himself by surrendering the thing to the borrower.

Borrower,
when to
bear
expenses.

NOTE.—Story Bailm., Sec. 273, Chap. 4, p. 276 see, also, note to Secs. 1887-1889, ante.

1893. The lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it, which he knew at the time of lending, and concealed from the borrower.

Lender
liable for
defects.

NOTE.—Story on Bailm., Sec. 275; approved, *Blake-more vs. Bristol and Exeter Railway Co.*, 8 El. & Bl., pp. 1035, 1051. And the rule limited to defects thus known and concealed.—*M'Carthy vs. Young*, 6 H. & N., p. 329.

1894. The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if, on the faith of such an agreement, the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss, exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having in any manner violated his duty.

Lender
may
require
return of
thing lent.

NOTE.—Edw. on Bailm., pp. 143, 177; *McAlister vs. Reab*, 4 Wend., p. 483; *Orser vs. Storms*, 9 Cowen R., p. 687; *Smith vs. Miles*, 1 T. R., p. 480. Lender has a strict right, at all times, to revoke a loan for an indefinite time.—5 Bac. Ab., Tresp. (C), pl. 9, 16, 17; *Putnam vs. Wyley*, 8 John. R., p. 433; 2 Camp. R., p. 464. Rests on the good faith and good pleasure of the

lender (Story Bailm., § 258), but in certain cases borrower has action for damages; still all such loans are at common law deemed precarious and at the mere will of the lender.—*Id.*, p. 277, § 288. Again: if revoked unreasonably, or after partly accomplished, suit for damages lies, or at least a recoupment may be had.

When
returnable
without
demand.

1895. If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand, as soon as the time has expired, or the purpose has been accomplished. In other cases it need not be returned until demanded.

NOTE.—Story Bailm., § 257: thing must be returned at time and place and in the manner contemplated by the contract. Courts endeavor to give effect to intention of the parties on this point.—*Edw. Bailm.*, p. 183; *Orser vs. Storms*, 9 Cowen R., p. 687; 8 Johns. R., p. 432. Case directly in point, see *Gilbert vs. Manchester Iron Manf'g Co.*, 11 Wend., p. 625.

Place of
return.

1896. The borrower of a thing for use must return it to the lender, at the place contemplated by the parties at the time of lending; or if no particular place was so contemplated by them, then at the place where it was at that time.

NOTE.—The place where they are to be restored, in the absence of express agreement, depends on circumstances, says *Edwards Bailm.*, p. 180. They must be returned ordinarily at the place where they were received.—*Id.* See on this point *Co. Litt.*, p. 210b; *Aldrich vs. Albee*, 1 Greenleaf R., p. 120; here it is said bailor may name the place. In *Bixby vs. Whitney*, 5 Greenleaf R., p. 192, it is said the bailee must seek the lender and learn in what place he will receive it. The text, however, fixes the place in the absence of a place fixed by agreement.

CHAPTER II.

LOAN FOR EXCHANGE.

SECTION 1902. Loan for exchange, what.

1903. Same.

SECTION 1904. Title to property lent.

1905. Contract cannot be modified by lender.

1906. Certain sections applicable.

1902. A loan for exchange is a contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing at a future time, without reward for its use.

Loan for
exchange,
what.

NOTE.—A LOAN FOR EXCHANGE is that contract which in the civil law is designated as a

"MUTUM," in which the identical thing lent is not to be returned, but another thing of the same kind, quality, nature, or value.—Story on Bailm., Sec. 47, and N. 3; Just. Inst., Lib. 3, Tit. 15; Dig., Lib. 44, Tit. 9, l. 1, Sec. 2; and other references there (Sec. 47, Story on Bail) made to Pothier, Pand.; Ayliffe, Pand.; Bell Comm.; Stair. Just., and Ersk. Inst. Thus, for example, when the loan is money, wine, or other things that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity. Jones on Bailm., p. 64; Story id., as above.

THE PROPERTY IN THE THING LOANED passes immediately from the lender to the borrower, and the identical thing lent cannot be recovered or redemanded. The borrower bears the loss of destruction (Edw. Bailm., p. 137), and is at common law a

SALE.—Id., p. 186. On an ordinary loan of a certain number of shares of stock, one share being just as good as another, it would only be necessary to return the same amount of stock in kind.—3 Ersk. Inst., Tit. 1, Sec. 18; see Edw. Bailment, Tit. "Pledges or Pawns," p. 204; consult Brewster vs. Hartly, 37 Cal., p. 15; though not directly in point, this question is to a certain extent ably argued, and each of the Justices rendered a separate opinion.

1903. A loan, which the borrower is allowed by the lender to treat as a loan for use, or for exchange, at his option, is subject to all the provisions of this Chapter.

Same.

NOTE.—This is interposed as a provision necessary to prevent frauds on third persons.

1904. By a loan for exchange the title to the

Title to
property
lent.

thing lent is transferred to the borrower, and he must bear all its expenses, and is entitled to all its increase.

NOTE.—Norton vs. Woodruff, 2 N. Y., p. 153; Foster vs. Pettibone, 7 id., p. 433; Mallory vs. Willis, 4 id., p. 76; Hurd vs. West, 7 Cow., p. 752; Carpenter vs. Griffin, 9 Paige, p. 310; see, also, Sec. 1902, ante, and note.

Contract
cannot be
modified
by lender.

1905. A lender for exchange cannot require the borrower to fulfill his obligations at a time, or in a manner, different from that which was originally agreed upon.

NOTE.—This follows from the nature of the contract. It is, in fact, simply an executory exchange and manifestly just to require parties to be controlled and governed by their agreement made at the time possession of the loan changes.

Certain
sections
applicable.

1906. Sections 1893, 1895, and 1896, apply to a loan for exchange.

NOTE.—See the sections referred to, ante, and notes.

CHAPTER III.

LOAN OF MONEY.

NOTE.—Originally no interest was allowed upon a loan of money; but with the progress of business it became necessary, and the transaction thus entered into, although in strictness a hiring, is universally known as a loan. This use of the word having obtained so long, it would be idle to attempt to change it.

SECTION 1912. Loan of money.

1913. Loan to be repaid in current money.

1914. Loan may be for reward.

1915. Interest, what.

1916. Annual rate.

1917. Legal interest.

1918. Same.

1919. Interest becomes part of principal, when.

1920. Interest on judgment.

Loan of
money.

1912. A loan of money is a contract by which one delivers a sum of money to another, and the latter

agrees to return at a future time a sum equivalent to that which he borrowed. A loan for mere use is governed by the Chapter on Loan for Use.

NOTE.—A loan of money is in-tanced by Story and Edwards in their definitions of a "*mutum*," or loan for exchange.—See Sec. 1902, ante, and note. The time of the return, like that of a loan for use, is to follow the agreement of the parties.—See Secs. 1893-6, ante, and notes. A loan of money is the "*mutum*" of the civil law, and is so treated in Title XII, Chapter II, "Loan for Consumption," Book III, La. Code.

1913. A borrower of money, unless there is an express contract to the contrary, must pay the amount due in such money as is current at the time when the loan becomes due, whether such money is worth more or less than the actual money lent.

Loan to be repaid in current money.

NOTE.—See Code La., Art. 2884. The loan of money differs from another ordinary "*mutum*" in this: the identical money is not *consumed*, but it passes beyond the control of the borrower, and is as incapable of being collected and returned almost as if it were actually consumed. This section recognizes the existence of the Act to us known as the Specific Contract Act, provided for in the Co. Civ. Pro. Cal., Sec. 667 (§ 200); see, also, Sec. 3367, post, and note.

Am

1914. A loan of money may be made with or without reward, but is presumed to be made for reward.

Loan may be for reward.

NOTE.—*Gillet vs. Van Rensselaer*, 15 N. Y., p. 397. It has been frequently asserted, says Edw. on Bailm., p. 262, that under the ancient common law, to take interest was illegal and criminal (*Hume's History*, 33 Chap.; 5 Cow. R., p. 608); but from the fact that the first statutes on the subject are all negative in terms, as if to prohibit a previously permitted practice, this assertion does not seem to be well sustained by facts. The first Act (37 Henry VIII, Chap. 9) provided that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds for one whole year." All subsequent Acts, even to the present day, are prohibitory in their character, which certainly recognizes the natural right to demand a compensation for the use of money. In California

no usury law has ever been enacted, but the rate of interest has always been left to rest in contract, except that fixed by law upon debts due and judgments obtained. Lord Hale (see Hard. Rep., p. 420) is reported to have said that only Jewish usury, forty per cent and more, was prohibited at common law.—Edw. on Bailm., p. 263. The rule allowing and implying a contract to pay interest is natural and equitable.

Interest,
what.

1915. Reward for the loan, forbearance, or use of money or its equivalent is called interest.

NOTE.—Interest is defined by Bouvier, p. 733, Vol. I, to be the compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor, in recompense for his detention of the debt.

Annual
rate.

1916. When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate.

NOTE.—This prevents any misunderstanding in cases of omission, and conforms to the general custom of borrowing and loaning, though in this State the custom most prevalent has been a monthly rate of interest.

Legal
interest.

1917. Under an obligation to pay interest, no rate being specified, interest is payable at the rate of ten per cent per annum, and in like proportion for a longer or shorter time; but in the computation of interest for less than a year, three hundred and sixty days are deemed to constitute a year.

NOTE.—Stats. 1868, p. 533, Sec. 7; 1870, p. 699, Sec. 1. The change from seven to ten per cent, in the cases put in the text, was made in 1870.

Same.

1918. Parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment.

NOTE.—Stats. 1868, p. 553, Sec. 2; 1870, p. 699, Sec. 1.

1919. The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if

the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.

Interest
becomes
part of
principal,
when.

NOTE.—Stats. 1850, p. 92, Sec. 3. This legalizes compound interest.

Am

1920. No judgment in any Court of this State shall draw interest at a rate to exceed seven per cent per annum. Interest must not be compounded in any manner or form on a judgment.

Interest on
judgment.

NOTE.—This conforms to the amendment of the Act of 1868, p. 553, as made in 1870, p. 699, Sec. 1.

TITLE V.

HIRING.

CHAPTER I. *Hiring in General.*

II. *Hiring of Real Property.*

III. *Hiring of Personal Property.*

CHAPTER I.

HIRING IN GENERAL.

SECTION 1925. Hiring, what.

1926. Products of thing.

1927. Quiet possession.

1928. Degree of care, etc., on part of hirer.

1929. Must repair injuries, etc.

1930. Thing let for a particular purpose.

1931. When letter may terminate the hiring.

1932. When hirer may terminate the hiring.

1933. When hiring terminates.

1934. When terminated by death, etc., of party.

1935. Apportionment of hire.

1925. Hiring is a contract by which one gives to another the temporary possession and use of property,

Hiring,
what.

other than money, for reward, and the latter agrees to return the same to the former at a future time.

NOTE.—Edw. Bailm., p. 37. Hiring termed in the civil law "*locatio conductio*," is a bailment of goods, always for a reward, and includes the *hire of things for use*. "*Locatio rei*," such as hiring horses and carriages for a journey, is a bailment of property which renders the bailee responsible for ordinary neglect.—*Millon vs. Salisbury*, 13 J. R., p. 211; *id.*, Chap. 6, p. 274; *Story Contracts*, Secs. 729-734. *Story Bailm.*, Sec. 8, divides all hiring into four sorts: 1. The hiring of a thing for use, *locatio rei*; 2. The hiring of work or labor, *locatio operis faciendi*; 3. The hiring of care and services to be performed or bestowed on the thing delivered, *locatio custodiæ*; and 4. The hiring of the carriage of goods, *locatio operis mercium vehendarum*. All these are from the civil law. Upon the subject of hiring in general, see *Story Bailm.*, Sec. 371, et seq., and notes; see, also, note to Sec. 1928, post. *Story on Bailm.*, Chap. 6, Sec. 368, gives as a translation, not literal, however, of the Roman law definition, the following: "It is a contract *whereby the use of a thing* (or the services and labor of a person), *are stipulated to be given for a certain reward*."—*Pothier, Contrat de Louage*, n. 1. Lord Holt defines it: "Where goods are left with the bailee to be used by him for hire."—*Coggs vs. Bunard*, 2 Ld. Raym., pp. 909-913.

Products of
thing.

1926. The products of a thing hired, during the hiring, belong to the hirer.

NOTE.—*Putnam vs. Wyley*, 8 Johns., p. 435. The increase of a flock hired for a term belongs to the person who hired them.—Edw. Bailm., p. 324. "Accession."—8 John. R., p. 435; *Wood vs. Ash*, Owen R., p. 138; *Bellows vs. Denison*, 9 N. Hamp. R., p. 293; *Allen vs. Allen*, 2 Penn., p. 166. So the increase of cattle.—La. Code, Articles 536, 537, and 539. See Sec. 732, ante, when the thing is not hired.

Quiet
possession.

1927. An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

NOTE.—*Vernam vs. Smith*, 15 N. Y., p. 327; *Story Bailm.*, Sec. 383. The letter, by the Roman, or civil law, founded in good reason (as taken from *Pothier*,

Domat, Co. Civ., France, and other authors given in Note 2, Sec. 383, id.), impliedly engages "to allow to *hirer* full use and enjoyment of the thing hired, and to fulfill his own engagements and trusts in respect to it according to the original intention of the parties." See the implications herein embraced (id.), fully sustaining the text.

1928. The hirer of a thing must use ordinary care for its preservation in safety and in good condition. Degree of care, etc., on part of hirer.

NOTE.—Edw. Bailm., p. 312. The engagements of the party taking a thing to hire *conductor rei*, are to put the thing to no other use than that for which it is hired; *to use it well; to take care of it; to restore it at the time appointed; to pay the price or hire; and in general to observe whatever is prescribed by the contract, or by law, or by custom.* The bailment being one of mutual benefit, the hirer is only responsible for that degree of diligence which all prudent men use in their own affairs. The man who hires a horse is bound to ride it moderately, and treat it as carefully as any man of common discretion would his own, and to supply it with suitable food. See, also, as to same points, Story Bailm., Sec. 397. Without reference to particular kinds of hiring, and which for peculiar reasons involve the most rigid degree of responsibility, "a bailee for hire is bound to use ordinary diligence and care in the protection of the property hired, which will vary in degree according to the nature of the property and the circumstances in which it is placed."—2 Hil. on Torts, p. 525, Chap. 44, Sec. 8; Swigert vs. Graham, 7 B. Mon., p. 661; Logan vs. Mathews, 6 Barr, p. 417; Runyon vs. Caldwell, 7 Humph., p. 134; Dudgeon vs. Teasse, 9 Mo., p. 857; McConike vs. N. Y., etc., 20 N. Y. (6 Smith), p. 495; Slocumb vs. Washington, 6 Jones, p. 357; Knox vs. North, etc., 6 Jones, p. 415; Tallahassee, etc., vs. Macon, 8 Fla., p. 299; Townsend vs. Hill, 18 Texas, p. 422; Dement vs. Scott, 2 Head., p. 367. The civil law, as laid down by Pothier, is in exact conformity with the common law, "that the hirer is bound only for ordinary diligence, and is liable only for ordinary negligence."

1929. The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence. Must repair injuries etc.

NOTE.—Story on Bailm., Secs. 398, 408-413; 2 Hil. on Torts, p. 525, Note 85.

Thing let
for a
particular
purpose.

1930. When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, the letter may hold him responsible for its safety during such use in all events, or may treat the contract as thereby rescinded.

NOTE.—This is an established rule as to personal property.—Fish vs. Ferris, 5 Duer, p. 49; Story Bailm., Sec. 43; Columbus vs. Howard, 6 Geo., p. 213; Duncan vs. R. R. Co., 2 Rich. L., p. 613; see Harrington vs. Snyder, 3 Barb., p. 380. It may be doubted whether the same rule is applied to real property. One who hires chattels for use must confine himself to the use for which he stipulates.—Edw. Bailm., p. 313.

When
letter may
terminate
the hiring.

1931. The letter of a thing may terminate the hiring and reclaim the thing before the end of the term agreed upon :

1. When the hirer uses or permits a use of the thing hired in a manner contrary to the agreement of the parties; or,

2. When the hirer does not, within a reasonable time after request, make such repairs as he is bound to make.

NOTE.—Edw. Bailm., p. 331, Tit. "Termination of Contract:" Made in any one of the various ways, which interrupts its continuance and prevents its execution. See, also, Story Bailm., Secs. 418-420.

When
hirer may
terminate
the hiring.

1932. The hirer of a thing may terminate the hiring before the end of the term agreed upon :

1. When the letter does not, within a reasonable time after request, fulfill his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into good condition, or repairing; or,

2. When the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, per-

ishes from any other cause than the ordinary negligence of the hirer.

NOTE.—See note to preceding section.

1933. The hiring of a thing terminates :

When
hiring
terminate

1. At the end of the term agreed upon;
2. By the mutual consent of the parties;
3. By the hirer acquiring a title to the thing hired superior to that of the letter; or,
4. By the destruction of the thing hired.

NOTE.—See note to Sec. 1931. As to Subd. 4, see *Graves vs. Berdan*, 26 N. Y., p. 498. The other clauses are matters of course, arising from "contract."

1934. If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby.

When
terminated
by death,
etc., of
party.

NOTE.—Story on Bailm., Sec. 419.

1935. When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him.

Apportion-
ment of
hire.

NOTE.—Modified from Story on Bailm., Sec. 418, 418a. See *Harrington vs. Snyder*, 3 Barb., p. 880; *George vs. Elliott*, 2 Hen. & Munf., p. 5; *Dudgeon vs. Teass*, 9 Mo., 867; *Bacot vs. Parnell*, 2 Bailey, p. 424; *Williams vs. Holcombe*, 1 N. C. Law, p. 365; *Redding vs. Hall*, 1 Bibb, p. 536; *Harrison vs. Murrell*, 5 Monr., p. 359.

CHAPTER II.

HIRING OF REAL PROPERTY.

SECTION 1941. Lessor to make dwelling house fit for its purpose.

1942. When lessee may make repairs, etc.

1943. Term of hiring when no limit is fixed.

1944. Hiring of lodgings for indefinite term.

SECTION 1945. Renewal of lease by lessee's continued possession.

1946. Notice to quit.

1947. Rent, when payable.

1948. Attornment of a tenant to a stranger.

1949. Tenant must deliver notice served on him.

1950. Letting parts of rooms forbidden.

Am

Lessor to
make
dwelling
house fit for
its purpose.

1941. The lessor of a building intended for the occupation of human beings must put it into a condition fit for that purpose, and must repair all subsequent dilapidations thereof, except such as are mentioned in Section 1929.

NOTE.—This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year eighteen hundred and sixty-one, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not rise again and again for adjudication were it not that the community at large revolt at every application of the rule.

Am

When
lessee may
make
repairs, etc.

1942. If, within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expenses of such repairs from the rent, or otherwise recover it from the lessor.

NOTE.—The rules prescribed in the preceding section necessitate this.

Term of
hiring
when no
limit is
fixed.

1943. A hiring of real property, other than lodgings and dwelling houses, in places where there is no usage on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring.

NOTE.—This section adopts a new but obviously convenient, if not necessary, rule as to the time for which the hiring is made. In some of the larger cities, such as New York, it is considered to operate well, and may everywhere.

1944. A hiring of lodgings or a dwelling house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly.

Hiring of lodgings for indefinite term.

NOTE.—Code Napoleon, § 1758; see *Jones vs. Mills*, 10 C. B. (N. S.), p. 788.

1945. If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year.

Renewal of lease by lessee's continued possession.

NOTE.—*Bishop vs. Howard*, 2 B. & C., p. 100; see *Doe vs. Amey*, 12 Ad. & El., p. 476; *Despard vs. Walbridge*, 15 N. Y., p. 374; *Hoff vs. Baum*, 21 Cal., p. 120. It was held that: "A new tenancy for one year is not created by the tenant, near the expiration of his term, obtaining from his landlord a receipt for one month's rent extending beyond the expiration of his term;" but if the landlord receives rent after the expiration of the term, a new lease is thereby created, but not necessarily for one year.—*Blumenberg vs. Myers*, 32 Cal., p. 93. This section provides a different rule from that of this case.

1946. A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month.

Notice to quit.

NOTE.—*Jones vs. Mills*, 10 C. B. (N. S.), p. 788; see, also, Co. Civ. Pro. Cal., Secs. 1161-1162, as to the method of terminating a lease by notice; see *Story on Cont.*, Secs. 932-3-4-4a-5. Notice.—To tenant at will. *Frisbie vs. Price*, 27 Cal., p. 253. Tenant denying land-

lord's title not entitled to notice.—*Bolton vs. Landers*, 27 Cal., p. 104; *Smith vs. Shaw*, 16 id., p. 88. Nor is a tenant conveying by warranty deed.—*Dodge vs. Wally*, 22 id., p. 224. Not necessary when not tenant. *Kilburn vs. Ritchie*, 2 id., p. 145. When to give under award.—*Ray vs. Armstrong*, 4 id., p. 208. What notice.—*Garbell vs. Fitch*, 6 id., p. 189. Service, how shown.—*Sullivan vs. Cary*, 17 id., p. 80. On whom.—*Schilling vs. Holmes*, 23 id., p. 227.

Rent, when payable.

1947. When there is no usage or contract to the contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due.

NOTE.—This is made to conform to general usage of other hirings in this Chapter.

Attornment of a tenant to a stranger.

1948. The attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a Court of competent jurisdiction.

NOTE.—Stats. 1855, p. 171, Sec. 7. In the case of *Steinbeck et al. vs. Krone et al.*, 36 Cal., p. 303, it was held that a tenancy is terminated by eviction of tenant on final process in an action of ejectment of which landlord had notice. See, also, *Sampson vs. Shaeffer*, 3 Cal., p. 196; *McDevitt vs. Sullivan*, 8 Cal., p. 592; see note to Sec. 1949, post.

Tenant must deliver notice served on him.

1949. Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord of the same.

NOTE.—To make a plea of eviction available to a defendant, in an action by the landlord against his tenant for possession, the tenant must be able to show, "of course, that notice (was) given of the proceeding by which he (the tenant was) is evicted, so that the landlord may not be taken by surprise and suffer an injury by reason of the carelessness or collusion of the tenant, and the notice may be oral."—*Wheelock vs. Warschauer*, 21 Cal., p. 316. See, also, id., 34 Cal., p. 265.

1950. One who hires part of a room for a dwelling is entitled to the whole of the room, notwithstanding any agreement to the contrary; and if a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the term agreed upon, and every tenant in the building, under the same landlord, is relieved from all obligation to pay rent to him while such double letting of any room continues.

Letting
parts of
rooms
forbidden.

NOTE.—This provision is intended to prevent one of the chief abuses of tenement houses. Mere penalties, whether civil or criminal, are not likely to be enforced. But the loss of rent would be a punishment that could be enforced by way of defense to an action therefor.

CHAPTER III.

HIRING OF PERSONAL PROPERTY.

SECTION 1955. Obligations of letter of personal property.

1956. Ordinary expenses.

1957. Extraordinary expenses.

1958. Return of thing hired.

1959. Charter party, what.

1955. One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.

Obligations
of letter of
personal
property.

NOTE.—See Sec. 1927 and note, ante; Story Bailm., Sec. 383: 1. Delivery to hirer essential, together with proper accompaniments for its use; 2. The use of the thing by the hirer must not be obstructed by the letter; 3. Letter must do no act to deprive hirer of the thing or of its proper use; 4. Third persons must not be able to disturb hirer's possession; and 5. The letter must keep the thing in suitable order and repair for its proper use. This note does not propose to give the language of Mr. Justice Story; but these essentials of

the undertaking of the letter to the hirer, with regard to the thing hired, are deducible from Sec. 383, *supra*. Also, see Secs. 388, 389, *id*.

Ordinary
expenses.

1956. A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

NOTE.—See notes to sections of Chap. I of this Title. Expenses naturally attendant.—See *Hanford vs. Palmer*, 2 Brod. & B., p. 359; *Story Bailm.*, Secs. 388, 389; the hirer to pay. But the letter must bear all the *extraordinary expenses*, such as medicines, etc., for a sick horse hired.—See *id.*; and *Harrington vs. Snyder*, 3 Barb., p. 380.

Extraor-
dinary
expenses.

1957. If a letter fails to fulfill his obligations, as prescribed by Section 1955, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him.

NOTE.—Thus the hirer of an animal may recover the expense of necessary medical attendance and extra accommodations during its sickness.—*Harrington vs. Snyder*, 3 Barb. p. 380; *Isbell vs. Norvell*, 4 Gratt., p. 176; see, however, *Redding vs. Hall*, 1 Bibb, p. 536.

Return of
thing hired

1958. At the expiration of the term for which personal property is hired, the hirer must return it to the letter at the place contemplated by the parties at the time of hiring; or, if no particular place was so contemplated by them, at the place at which it was at that time.

NOTE.—See *Story on Bailm.*, Secs. 414, 415. The same rule applies here as to other bailments.—See *Edwards on Bailm.*, p. 333, Notes 2, 3, 4, and cases there cited.

Charter
party.
what.

1959. The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or

may surrender the entire ship to the charterer, who then provides them himself. The master or a part owner may be a charterer.

NOTE.—1 Pars. Mar. Law, p. 229, et seq.; Edw. on Bailm., pp. 439, 549, 550; Clarkson vs. Edes, 4 Cowen R., p. 470; Marcadin vs. The Chesapeake Ins. Com., 8 Cranch R., p. 49. "A person may be owner for the voyage who by a contract with the general owner hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship," but when the general owner retains these, and contracts to carry a cargo on freight for the voyage, it is affreightment sounding in covenant. In the first case the general freighter responsible for the master, in the latter the general owner is liable.

TITLE VI.

SERVICE.

- CHAPTER I. *Service with Employment.*
 II. *Particular Employments.*
 III. *Service without Employment.*

CHAPTER I.

SERVICE WITH EMPLOYMENT.

- ARTICLE I. DEFINITION OF EMPLOYMENT.
 II. OBLIGATIONS OF THE EMPLOYER.
 III. OBLIGATIONS OF THE EMPLOYEE.
 IV. TERMINATION OF EMPLOYMENT.

ARTICLE I.

DEFINITION OF EMPLOYMENT.

SECTION 1965. Employment, what.

1965. The contract of employment is a contract by which one, who is called the employer, engages Employment, what

another, who is called the employé, to do something for the benefit of the employer, or of a third person.

NOTE.—The scope of this Chapter is not confined to servants, but includes factors, brokers, carriers, agents, and all similar classes of persons. See Edw. Bailm., p. 338; Story Bailm., Secs. 421-423.

ARTICLE II.

OBLIGATIONS OF THE EMPLOYER.

SECTION 1969. When employer must indemnify employé.

1970. When not.

1971. Employer to indemnify for his own negligence.

When
employer
must
indemnify
employé.

1969. An employer must indemnify his employé, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employé, at the time of obeying such directions, believed them to be unlawful.

NOTE.—“Indemnity for losses in discharge of his duties.”—Story Agency, Secs. 335-340; Code La., §§ 2991, 2993; *Castle vs. Noyes*, 14 N. Y., p. 332; *Powell vs. Newburgh*, 19 Johns., p. 284; *Ramsay vs. Gardner*, 11 id., p. 439; *Adamson vs. Jarvis*, 4 Bing., p. 66; *Betts vs. Gibbins*, 2 Ad. & L., p. 57; *Taylor vs. Stray*, 2 C. B. (N. S.), p. 196. “Or resulting from obedience to employer.”—*Roberts vs. Smith*, 2 H. & N., p. 213. “Even though unlawful.”—*Adamson vs. Jarvis*, 4 Bing., p. 66; see *Humphrey vs. Pratt*, 5 Bligh (N. S.), p. 154; as explained in *Collins vs. Evans*, 2 Q. B., pp. 829, 830. The case of *Baxter vs. Roberts*, Sup. Ct. Cal., July Term, 1872, is an important case in the support of this text. In that case, the employé suffered injury by the employer concealing from him the dangerous nature of his intended employment, and the employer was held liable.

When not.

1970. An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence

of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.

NOTE.—“Employer not bound for losses caused by ordinary risks, nor by acts of co-employé.”—*Sherman vs. Rochester and Syracuse R. R.*, 17 N. Y., p. 156; *Russell vs. Hudson River R. R.*, id., p. 136; *Coon vs. Syracuse and Utica R. R.*, 5 id., p. 492; *Boldt vs. New York Central R. R.*, 18 id., p. 432. “Unless employer has not used care in selecting culpable employé.”—See same cases, and *Ormond vs. Holland, El. B. & E.*, p., 105.

1971. An employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care.

Employer to indemnify for his own negligence.

NOTE.—*Ryan vs. Fowler*, 24 N. Y., p. 400; *Roberts vs. Smith*, 2 H. & N., p. 213; *Keegan vs. Western R. R.*, 8 N. Y., pp. 175-180.

ARTICLE III.

OBLIGATIONS OF THE EMPLOYE.

SECTION 1975. Duties of gratuitous employé.

1976. Same.

1977. Same.

1978. Duties of employé for reward.

1979. Duties of employé for his own benefit.

1980. Contracts for service limited to two years.

1981. Employé must obey employer.

1982. Employé to conform to usage.

1983. Degree of skill required.

1984. Must use what skill he has.

1985. What belongs to employer.

1986. Duty to account.

1987. Employé not bound to deliver without demand.

1988. Preference to be given to employers.

1989. Responsibility of employé for substitute.

1990. Responsibility for negligence.

1991. Surviving employé.

1992. Confidential employment.

1975. One who, without consideration, undertakes to do a service for another, is not bound to perform

Duties of
gratuitous
employé.

the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

NOTE.—Edson vs. Watson, 7 Cow., p. 278; Cogg vs. Bernard, 2 Ld. Raym., p. 909; Elsee vs. Gatward, 5 T. R., p. 143; Wilson vs. Brett, 11 M. & W., p. 113; see Nolton vs. Western R. R., 15 N. Y., p. 440; see Story on Bailm., Sec. 436. In cases of a gratuitous mandate the mandatary cannot be compelled to execute his undertaking if he has not already entered upon the execution of it.—Beauchamp vs. Pawley, 1 Mood. & Rob., p. 38; Callendar vs. Oelricks, 1 Arnold R., pp. 401-404. But in cases of hire of work the hirer is liable not only for misfeasance, but also for nonfeasance. Id., Sec. 436.

Same.

1976. One who, by his own special request, induces another to intrust him with the performance of a service, must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

NOTE.—This distinction is recognized by the civil law, but it is not clear that it is admitted by the common law. There is good reason for it, since a volunteer of this kind might seriously mislead one who relied upon him, and who would otherwise have employed some one else for a compensation, and thus have been sure of the service he required. See Story on Bailm., Secs. 165, 166, 167.

Same.

1977. A gratuitous employé, who accepts a written power of attorney, must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so.

NOTE.—Code La., § 2971. This provision is new to the common law, but is founded upon justice. By retaining the instrument, the attorney keeps in his hands a power which he may use to the detriment of his principal, and misleads the latter into the belief that he will use it for his benefit.

Duties of
employé
for reward.

1978. One who, for a good consideration, agrees to serve another, must perform the service, and must

use ordinary care and diligence therein, so long as he is thus employed.

NOTE.—The obligations or duties on the part of the workman or undertaker, are thus summed up in the foreign law: 1. "To do the work;" 2. "To do it at the time agreed on;" 3. "To do it well;" 4. "To employ the materials furnished by the employer in a proper manner;" and 5, and lastly, "to exercise the proper degree of care and diligence about the work." See Pothier Contrat de Louage, n. 419 to 423; 2 Pardes Droit Commer., p. 2, Art. 523 to 525 and 528. As to "the degree of care or diligence for which bailees of work for hire are responsible, the general rule is (as has been often observed) that where the contract is of mutual benefit, then ordinary diligence alone is required. And this is the degree of diligence, therefore, which applies to contracts of this sort, as well by the common law as by the Roman and foreign law." Story on Bailm., Secs. 428, 429, and Note 3. A watch-maker, having a watch left with him for repairs, is obliged to use due diligence in keeping it; and if he omits it, and the watch is lost, he is liable for the value of it.—Clark vs. Farnshaw, 1 Gow. R., p. 30. Regarding the obligation to do the work, it may generally be stated that it will be sufficient if the undertaker does the work by the means of other persons, or sub-agents, if the work is such as may be ordinarily done by others in an equally satisfactory manner; but when it is a work of skill, or art, the services of a particular artist may be fairly presumed to be contracted for.—Id., Sec. 428; also, 429, 442, 338, 339. Ordinary care and diligence are all that are required.—Johnson vs. N. Y. Central R. R., 31 Barb., p. 196; Ackley vs. Kellogg, 8 Cow., p. 223; Brown vs. Dennison, 2 Wend., p. 593; Plate vs. Hibbard, 7 Cow., p. 497.

1979. One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein to protect the interest of the latter.

Duties of
employé
for his own
benefit.

NOTE.—Where skill as well as care is required in performing the undertaking, there, if the party *purports to have skill* in the business, and *he undertakes for hire*, he is bound not only to ordinary care and diligence in securing and preserving the thing, but also to

the exercise of due and ordinary skill in the employment of his art or business about it; or in other words, he undertakes to perform it in a workmanlike manner.—Story on Bailm., Sec. 431, Note 4, and authorities there cited. “Every man is *presumed* to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes.”—2 Kent Comm., p. 588, and cases there cited. Ordinary skill in the particular business or employment is that which is meant.—Story on Bailm., Sec. 433. “If the bailee (or employé) is known not to possess it (skill), or *he does not exercise* the particular art or employment to which it belongs, *and he makes no pretension to skill in it*, then, if the bailor (employer), with full notice, trusts him with the undertaking, the bailee (employé) is bound only for a reasonable exercise of the skill he possesses, or of the judgment which he can employ.”—Story Bailm., Sec. 435. Of course the converse of this rule, as set out in the text, is by implication sustained by this authority. A hirer for work is liable not only for misfeasance but for nonfeasance, for the reason of mutuality of consideration; if it is more for his benefit than the employer's, the rule in the text is just and equitable.

Contracts
for service
limited to
two years.

1980. A contract to render personal service, other than a contract of apprenticeship, as provided in the Chapter on Master and Servant, cannot be enforced against the employé beyond the term of two years from the commencement of service under it; but if the employé voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

aw

NOTE.—This is a new but obviously just provision.

Employé
must obey
employer.

1981. An employé must substantially comply with all the directions of his employer concerning the service on which he is engaged, even though contrary to the provisions of this Title, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employé, or in case of an emergency which, according to the best information which the employé can with reasonable diligence obtain, the employer did not contemplate, in which he cannot, with reasonable diligence, be consulted,

and in which non-compliance is judged by the employer, in good faith, and in the exercise of reasonable discretion, to be absolutely necessary for the protection of the employer's interests. In all such cases the employé must conform as nearly to the directions of his employer as may be reasonably practicable, and most for the interest of the latter.

NOTE.—*Substantial and not literal obedience* is required.—Johnson vs. N. Y. Central R. R., 31 Barb., p. 196; Parkhill vs. Imlay, 15 Wend., p. 431. *To directions of employer*.—Evans vs. Root, 7 N. Y., p. 186; Blot vs. Boiceau, 3 id., p. 78; Bruce vs. Davenport, 36 Barb., p. 349; Bell vs. Palmer, 6 Cow., p. 128; Wilson vs. Wilson, 26 Penn. St., p. 394, see Johnson vs. N. Y. Central R. R., 31 Barb., p. 196; Ackley vs. Kellogg, 8 Cow., p. 223; Turner vs. Mason, 14 M. & W., p. 112; Amor vs. Fearon, 9 Ad. & El., p. 548. *Except when obedience is impossible*.—Johnson vs. N. Y. Central R. R., 31 Barb., p. 196; Drummond vs. Wood, 2 Caines, p. 310. In emergencies, and where the interests of employer are at stake, he may exercise extraordinary powers.—See Story on Agency, Secs. 85, 141, 193; Duser vs. Perit, 4 Binn., p. 361; Liotard vs. Graves, 3 Caines R., p. 226; Lawlor vs. Keaquick, 1 Johns. Cas., p. 174; Drummond vs. Wood, 2 Caines R., p. 310; Forrester vs. Bordman, 1 Story R., p. 43. *Conforming as nearly as may be to directions of and for the interests of employer*.—Johnson vs. N. Y. Central R. R., 31 Barb., 196.

1982. An employé must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

Employé
to conform
to usage.

NOTE.—Story on Agency, Sec. 199; Johnson vs. N. Y. Central R. R., 31 Barb., p. 196; see Horton vs. Morgan, 19 N. Y., p. 170; 1 Gallis R., p. 360; Reano vs. Mager, 11 Martin R., p. 636; see, also, Viana vs. Barclay, 3 Cowen R., p. 281; Mackbeath vs. Haldimand, 1 T. R., p. 182, per Buller, J; Lucas vs. Groning, 7 Taunt. R., p. 164; Morrell vs. Frith, 3 Mees. & Wels., p. 402. These latter cases are more particularly on the matter of instructions of the employer and their construction, and the usage of trade.

Degree of
skill
required.

1983. An employé is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

NOTE.—“Employé to exercise skill.”—*Harmer vs. Cornelius*, 5 C. B. (N. S.), p. 236; *Story Bailm.*, Secs. 431-435; see *Cuckson vs. Stones*, 1 El. & El., p. 248. “Unless employer has notice of his want of it.”—*Shiells vs. Blackburne*, 1 H. Blacks., p. 158; *Felt vs. School Dist.*, 24 Vt., p. 297; see, also, note to Sec. 1979, ante; *Story on Bailm.*, Sec. 435, as to known want of skill.

Must use
what skill
he has.

Am
1984. An employé is always bound to use such skill as he possesses.

NOTE.—*Wilson vs. Brett*, 11 M. & W., p. 113. Ordinary or reasonable skill required.—*Story Bailm.*, Sec. 433. Bound only for a reasonable exercise of the skill which he possesses.—*Id.*, Sec. 435; consult *Leet vs. Wilson*, 24 Cal., p. 398.

What
belongs to
employer.

1985. Everything which an employé acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

NOTE.—Code La., § 2974; see *Tenant vs. Elliott*, 1 Bos. & P., p. 3; *Farmer vs. Russell*, *id.*, p. 296; *Bousfield vs. Wilson*, 16 M. & W., p. 185; *Edmondstone vs. Hartshorne*, 19 N. Y., p. 9; see *Story on Bailm.*, Sec. 441c. If extraordinary work is done, or superior materials are used, the employé or undertaker is not entitled to compensation therefor, though the value of the thing is greatly enhanced thereby, but are for the benefit of the employer, unless so done or used by his consent, approval, or acquiescence.—*Wilmot vs. Smith*, 3 Carr & Payne, p. 453; *Lovelock vs. King*, 1 Mood. & Rob., p. 60; *Burn vs. Miller*, 4 Taunt., pp. 745, 749.

Duty to
account.

1986. An employé must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable, and must, without demand, give prompt notice to his

employer of everything which he receives for his account.

NOTE.—Story on Agency, Sec. 203; Collyer vs. Dudley, Turn. & Russ., p. 421; by Duer, J., Heubach vs. Mollmann, 2 Duer, pp. 227, 252; see Edmondstone vs. Hartshorne, 19 N. Y., p. 9; also, see Story on Agency, Secs. 207, 208.

1987. An employé who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employé himself.

Employé
not bound
to deliver
without
demand.

NOTE.—This seems to be the true principle upon which the cases holding a demand to be necessary as against a factor (Baird vs. Walker, 12 Barb., p. 298; Halden vs. Crafts, 4 E. D. Smith, p. 490; 2 Abb. Pr., p. 301; Cooley vs. Betts, 24 Wend., p. 203; Ferris vs. Paris, 10 Johns., p. 285), an attorney (Stafford vs. Richardson, 15 Wend., p. 302; Rathbun vs. Ingalls, 7 id., p. 320; Taylor vs. Bates, 5 Cow., p. 376; Beardsley vs. Root, 11 Johns., p. 464), and other agents (Reina vs. Cross, 6 Cal., p. 31), are founded. In Lillie vs. Hoyt, 5 Hill, p. 395, the rule was limited to attorneys and factors, but without reason. The defendant, in that case, seems to have been a mere servant. In Stacy vs. Graham, 14 N. Y., p. 492, affirming S. C., 3 Duer, p. 444, the defendant had been *instructed* to remit. "Nor must he send it a distance without demand."—Heubach vs. Mollmann, 2 Duer, p. 227. "Nor by a mode involving greater risk than if in employé's possession." This qualification seems to be just. See, also, Story on Agency, Secs. 207, 208.

Am

1988. An employé who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference. If intrusted with similar affairs by different employers, he must give them preference according to their relative urgency, or, other things being equal, according to the order in which they were committed to him.

Preference
to be given
to
employers.

NOTE.—There is no direct authority for these provisions, but they are required by sound principle.

Responsi-
bility of
employé
for
substitute.

1989. An employé who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

NOTE.—Story on Agency, § 217a. An agent employed by a Trustee is accountable to him, and not to the *cestui que trust* (Myles vs. Fitzpatrick, 6 Madd. R., p. 360); so a sub-agent by an agent, ordinarily (Cartwright vs. Hadley, 1 Ves., Jr., p. 292; Pinto vs. Santos, 5 Taunt. R., p. 447, and others cited in note to Sec. 217a, supra); but when by usage of trade, or otherwise, a sub-agent is employed with the express or implied consent of the principal, then the original agent will not be responsible, but the sub-agent is for his own misconduct.—Sec. 217a, supra, and Note 4. Other authority to appoint substitutes.—Story on Agency, Sec. 201.

Responsi-
bility for
negligence.

1990. An employé who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

NOTE.—Story on Agency, Chap. 8, Secs. 217c to 223, and notes on cases cited.

Surviving
employé.

1991. Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

NOTE.—Story on Bailm., Sec. 202, where the question is fully discussed and the text sustained, by implication at least, in pertinently asking the question: "Suppose goods are sent to a partnership at Boston, to be by them sent to New Orleans, and they gratuitously undertake to forward them, and then one of the partners dies, is the mandate at an end, it being an act in its own nature requiring no peculiar personal confidence or skill?" which question the text fully answers. Mandatary is of course here used as employé, as a convertible term.

1992. The obligations peculiar to confidential employments are defined in the Title on Trusts. Confidential employment.

NOTE.—See Title VIII of this Part, "Trust," Secs. 2215-2289, inclusive.

ARTICLE IV.

TERMINATION OF EMPLOYMENT.

SECTION 1996. Termination by death, etc., of employer.

1997. Employment, how terminated.

1998. Continuance of service in certain cases.

1999. Termination at will.

2000. Termination by employer for fault.

2001. Termination by employé for fault.

2002. Compensation of employé dismissed for cause.

2003. Compensation of employé leaving for cause.

1996. Every employment in which the power of the employé is not coupled with an interest in its subject is terminated by notice to him of: Termination by death, etc., of employer.

1. The death of the employer; or,
2. His legal incapacity to contract.

NOTE.—This section alters the common law by continuing the power until the agent has notice of the principal's change of condition. Such a rule is advocated by Story (Agency, Sec. 495), and is obviously just. See, also, note to Sec. 1997, post; see, also, Sec. 2356 and note, post.

1997. Every employment is terminated :

1. By the expiration of its appointed term;
2. By the extinction of its subject;
3. By the death of the employé; or,
4. By his legal incapacity to act as such.

Employment, how terminated

NOTE.—Story Agency, Sec. 495, Note 3; 2 Kent's Comm., Lect. 41, p. 646 (4th ed.) See, also, Story on Bailm., Secs. 204, 205; Story Agency, Secs. 465, 466, 483. Thompson on Bills (pp. 224-227, 2d ed., 1836), discussing the limitation of agency, says: "Mandates (here used as convertible with agency or employments) terminate in general by the death of the mandant or mandatary; by the insanity of the latter; by revocation; by renunciation; or by the sequestration of the man-

dant, which vests his estate and all the rights connected with it in his creditors. To bind third parties, they must be notified of the dissolution; or it must be made notorious."—Id; Story Agency, Secs. 462, 463, et seq. See, also, Sec. 2355 and note, post.

Continu-
ance of
service in
certain
cases.

1998. An employé, unless the term of his service has expired, or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employé for such service according to the terms of the contract of employment.

NOTE.—Story Agency, Secs. 495-497.

Termina-
tion at will.

1999. An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title.

NOTE.—Story Ag., Secs. 462, 476, 477; Hathaway vs. Bennett, 10 N. Y., p. 108; Ward vs. Ruckman, 34 Barb., p. 419; see Beeston vs. Collyer, 4 Bing., p. 309.

Termina-
tion by
employer
for fault.

2000. An employment, even for a specified term, may be terminated at any time by the employer, in case of any willful breach of duty by the employé in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

NOTE.—"Terminated by willful breach of duty by the employer."—McDonald vs. Lord, 26 How. Pr., p. 404; Lilly vs. Elwin, 11 Q. B., p. 742; Ridgway vs. Hungerford Market Co., 3 Ad. & El., p. 171; Turner vs. Mason, 14 M. & W., p. 112. "Or by habitual neglect of duty."—See Fillieul vs. Armstrong, 7 Ad. & El., p. 557; Callo vs. Brouncker, 4 Carr & P., p. 518. A dismissal may be justified on these grounds, whether the employer knew of their existence or not.—Spota-wood vs. Barrow, 5 Exch., p. 110. "Or continued incapacity to perform it."—Harmer vs. Cornelius, 5 C.

B. (N. S.), p. 236; see *Cuckson vs. Stones*, 1 El. & El., p. 248. It is otherwise where a mate or seaman is incapacitated from illness or injury incurred without his fault. See Sec. 2060, post, and note.

2001. An employment, even for a specified term, may be terminated by the employé at any time, in case of any willful or permanent breach of the obligations of his employer to him as an employé.

Termination by employé for fault.

NOTE.—A female servant was held justified in quitting service on account of indecent assaults by her master's father, although her master had no part in them, his failure to protect her being held sufficient cause for leaving.—*Patterson vs. Gage*, 23 Verm., p. 558. A servant who, not being in fault, was required to promise "to do better," as a condition of his remaining, was held to have rightfully refused to stay upon those terms.—*Pritchard vs. Martin*, 27 Miss., p. 305. A seaman is justified in quitting the ship if it is unseaworthy.—*Savary vs. Clements*, 8 Gray, p. 155; *Bucker vs. Klerkgeter*, 1 Abbott Adm., p. 402; *Bray vs. The Atlanta, Bee Adm.*, p. 48. Or if no provisions are furnished him.—*The Castalia*, 1 Hagg. Adm., p. 59; *Dixon vs. The Cyrus*, 2 Pet. Adm., p. 407. Or if he is cruelly treated.—*Ward vs. Ames*, 9 Johns., p. 138; *Relf vs. The Maria*, 1 Pet. Adm., p. 193; *The Minerva*, 1 Hagg. Adm., p. 368; *Steele vs. Thatcher*, Ware, p. 94. Or even threatened with cruelty.—*Edward vs. Trevellick*, 4 El. & Bl., p. 59. The principle upon which these decisions are founded is evidently that stated in the text.

2002. An employé, dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

Compensation of employé dismissed for cause.

NOTE.—Thus a clerk, whose salary payable quarterly, is not entitled to any salary for the fraction of a quarter in the course of which he is dismissed for cause.—*Ridgway vs. Hungerford Market Co.*, 3 Ad. & El., p. 171; *Turner vs. Robinson*, 5 B. & Ad., p. 789; 6 Car. & P., p. 15; *Atkin vs. Acton*, 4 Car. & P., p. 208. But he ought to recover the preceding quarter's salary, if not paid.

Compensation of employé leaving for cause.

2003. An employé who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance.

NOTE.—Patterson vs. Gage, 23 Verm., p. 558;
Pritchard vs. Martin, 28 Miss., p. 305.

CHAPTER II.

PARTICULAR EMPLOYMENTS.

ARTICLE I. MASTER AND SERVANT.

II. AGENTS.

III. FACTORS.

IV. SHIPMASTERS.

V. MATES AND SEAMEN.

VI. SHIPS' MANAGERS.

ARTICLE I.

MASTER AND SERVANT.

SECTION 2009. Servant, what.

2010. Term of hiring.

2011. Same.

2012. Renewal of hiring.

2013. Time of service.

2014. Servant to pay over without demand.

2015. When servant may be discharged.

Servant, what.

2009. A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.

NOTE.—In personal relations—"domestics"—those who receive wages and who are lodged and fed in the house of another and employed in his service. Such servants are not particularly recognized by law; they are menial servants.—1 Black. Comm., p. 324; Wood

Inst., p. 53; see Bouv. Law Dict., 2 vol., p. 513, Title "Servants." The Title "Master and Servant," ante, Secs. 264-276, inclusive, relates exclusively to apprentices. The right of the master to their (servants') services in every respect is grounded on the contract between them.—Bouv. Law Dict., id. Bouvier also says, id: Laborers or persons hired by the day's work, or any longer time, are not considered servants, and gives an array of authorities in support of his position. It will be seen, however, by the next section that the Code changes the understanding or definition of the term "servant."

2010. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.

Term of hiring.

NOTE.—See Davis vs. Marshall, 4 Law Times (N. S.), p. 216; 6 H. & N. (Am. ed.), p. 916. It seems eminently proper, also, that the presumption, in the absence of express agreement, should here follow the same rule adopted for rent.—See Sec. 1944, ante. Case directly in point, Cany vs. Halleck, 9 Cal., p. 198. No implied contract by partnership to pay for the services of one partner's wife as cook.—Angulo vs. Sunol, 14 Cal., p. 402.

2011. In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the mouth, at a monthly rate of reasonable wages, to be paid when the service is performed.

Same.

NOTE.—See Fawcett vs. Cash, 5 B. & Ad., p. 904; see, also, the rule in Secs. 2010, 1944, ante, but see De Briar vs. Minturn, 1 Cal., p. 450. Nominal damages only if any could be recovered in such case.—Id. Fixed term.—See Webster vs. Wade, 19 Cal., p. 291. Contract entire.—Hutchinson vs. Wetmore, 2 Cal., p. 311. Slight evidence of assent will enable one to recover on part performance of service.—Hogan vs. Titlow, 14 Cal., p. 255.

2012. Where, after the expiration of an agreement respecting the wages and the term of service,

Renewal of hiring. the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

NOTE.—*Deckert vs. Camden & Amboy R. R.*, Gen. Term Supreme Court, 1864. This text directly sustained in *Nicholson vs. Patchin*, 5 Cal., p. 474.

Time of service. 2013. The entire time of a domestic servant belongs to the master; and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day.

NOTE.—See *Edwards on Bailm.*, Sec. 384. The “contract must be performed according to agreement of the parties.” Here the law supplies the number of hours of labor implied in all such agreements at not more than ten hours.

Servant to pay over without demand. 2014. A servant must deliver to his master, as soon as with reasonable diligence he can find him, everything that he receives for his account, without demand; but he is not bound, without orders from his master, to send anything to him through another person.

NOTE.—Manifestly within the contract, and must be performed. Conversion or appropriation to his own use property of another coming to him in virtue of his employment is embezzlement.—*Penal Code Cal.*, Sec. 508; see, also, Sec. 1987, ante, where this text, at least by negative implication, is sustained.

When servant may be discharged. 2015. A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:

1. If he is guilty of misconduct in the course of his service, or of gross immorality, though unconnected with the same; or,

2. If, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature

that, if the master had known or contemplated it, he would not have so employed him.

NOTE.—“May discharge any servant other than an apprentice” (see *Winstone vs. Linn*, 1 B. & C., p. 460); “for misconduct in course of service” (see *Turner vs. Mason*, 14 M. & W., p. 112; *Singer vs. McCormick*, 4 Watts & S., p. 265; *Amor vs. Fearon*, 9 Ad. & El., p. 548; *Callo vs. Brouncker*, 4 Carr. & P., p. 518); “or gross immorality disconnected with service” (*Aitken vs. Acton*, 4 Carr. & P., p. 208; *Libhart vs. Wood*, 1 Watts & S., p. 265; see, also, *De Briar vs. Minturn*, 1 Cal., p. 450). If employer without good cause discharge servant before the term of service fixed has transpired he is still liable.—*Webster vs. Wade*, 19 Cal., p. 291.

ARTICLE II.

AGENTS.

SECTION 2019. Agent to conform to his authority.

2020. Must keep his principal informed.

2021. Collecting agent.

2022. Responsibility of sub-agent.

2019. An agent must not exceed the limits of his actual authority, as defined by the Title on Agency.

Agent to conform to his authority.

NOTE.—See Title IX of this Part, post. Sec. 2295 of Art. I gives this definition: “An agent is one who represents another, called the principal, in dealings with third persons.” Such person is the subject of this Article. His authority is specially defined in the Title referred to *supra*.

2020. An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency.

Must keep his principal informed.

NOTE.—It is the duty of agents to keep their principals apprised of their doings, and to give them notice, within a reasonable time, of all such facts and circumstances as may be important to their interests; and if by neglect of the agent the principal suffers a loss, he is entitled to be indemnified by the agent.—See *Story on Agency*, Sec. 208. He is not bound to inform the principal of the receipt of instructions, and of his intention to comply therewith.—*Parkhill vs. Imlay*, 15

Wend., p. 431. On duty of agent generally, see *Caffrey vs. Darby*, 6 Ves., p. 496; *Massey vs. Banner*, 1 Jac. & Walk., p. 241; 4 Madd. R., p. 413; *Wren vs. Kinton*, 11 Ves., pp. 377-382; *Fletcher vs. Walker*, 3 Madd. R., p. 73; *Macdonnell vs. Harding*, 7 Sim. R., p. 178; *Harmon vs. Cottle*, 6 Serg. & Rawle, p. 290; see, also, Sec. 1986, ante, and note. *Crawfer vs. Louisiana State Bank*, 13 Martin R., p. 214; must notify his employer of acceptance or non-acceptance of bill of exchange. Also, *Montillat vs. Bank of U. S.*, 13 id., p. 365; *Miranda vs. City B. N. O.*, 6 Mill. La. R., p. 740; *Pritchard vs. La. State Bank*, 2 Mill. La. Rep., p. 415.

Collecting
agent.

2021. An agent employed to collect a negotiable instrument must collect it promptly, and take all measures necessary to charge the parties thereto, in case of its dishonor; and, if it is a bill of exchange, must present it for acceptance with reasonable diligence.

NOTE.—“Duty in case of dishonor.”—See *Walker vs. Bank of State of N. Y.*, 9 N. Y., p. 582; *Montgomery Co. Bank vs. Albany City Bank*, 7 id., p. 459. “Present it for acceptance with diligence.”—*Allen vs. Suydam*, 20 Wend., p. 321. And to notify employer of the acceptance or non-acceptance.—*Story on Agency*, Sec. 208.

Responsi-
bility of
sub-agent.

2022. A mere agent of an agent is not responsible as such to the principal of the latter.

NOTE.—Thus, if A employs B to do some act which B employs C to do, C is not responsible to A (*Montgomery Co. Bank vs. Albany City Bank*, 7 N. Y., p. 459; *Commercial Bank vs. Union Bank*, 11 id., p. 203); but if B employs C as a sub-agent of A, and not merely as his own agent, C is responsible to his ultimate principal. This is certainly so where the agent is authorized to employ a sub-agent. See Sec. 1989 and note, ante.

ARTICLE III.

FACTORS.

SECTION 2026. Factor, what.

2027. Obedience required from factor.

2028. Sales on credit.

2029. Liability of factor under guaranty commission.

2030. Factor cannot relieve himself from liability.

2026. A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser.

Factor,
what.

NOTE.—Story on Agency, Sec. 33, gives almost the same definition of a factor, and refers to many authorities in Notes 2, 3. In the latter (id.) is reference to 1 Bell Comm., p. 212, et seq. The description here given of a factor answers precisely to that of a commission merchant or consignee for sale.

2027. A factor must obey the instructions of his principal to the same extent as any other employé, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.

Obedience
required
from factor.

NOTE.—“Factor must obey instructions as any other employé.”—See *Evans vs. Root*, 7 N. Y., p. 186. “Notwithstanding advances to principal.”—*Blot vs. Boiceau*, 3 N. Y., p. 78; *Marfield vs. Goodhue*, id., p. 62; *Bell vs. Palmer*, 6 Cow., p. 128. “Except his principal forbids him to sell.”—*Marfield vs. Goodhue*, 3 N. Y., p. 62. The exception does not extend to an order to sell, even though for less than advances.—*Bell vs. Palmer*, 6 Cow., p. 128. “He may still sell to reimburse himself, on giving notice.”—*Marfield vs. Goodhue*, 3 N. Y., p. 62.

2028. A factor may sell property consigned to him on such credit as is usual; but, having once agreed with the purchaser upon the term of credit, may not extend it.

Sales on
credit.

NOTE.—1 Story Cont., Sec. 150; *Van Allen vs. Vanderpoel*, 6 Johns., p. 69; *McKinstry vs. Pearsall*, 3 id., p. 319; see *Robertson vs. Livingston*, 5 Cow., p. 473; *Douglass vs. Bernard*, Anth. N. P., p. 278. It is said

in Story's Agency, Sec. 33, that a factor may now ordinarily sell goods on a credit. See, also, *id.*, post, Secs. 60, 110, 209.

Liability of
factor
under
guaranty
commission

2029. A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.

NOTE.—“Factor becomes liable to pay price and not as a mere guarantor.”—*Sherwood vs. Stone*, 14 N. Y., p. 267; *Wolff vs. Koppel*, 5 Hill, p. 358; affirmed 2 Den., p. 368; *Hastie vs. Couturier*, 8 Exch., p. 40. “But he does not thereby become more responsible for the safety of remittance.”—*Heubach vs. Mollmann*, 2 Duer, p. 227; *Leverich vs. Meigs*, 1 Cow., p. 645.

Factor can-
not relieve
himself
from
liability.

2030. A factor who receives property for sale, under a general agreement or usage to guarantee the sales or the remittance of the proceeds, cannot relieve himself from responsibility therefor without the consent of his principal.

NOTE.—*Heubach vs. Mollmann*, 2 Duer, p. 227.

ARTICLE IV.

SHIPMASTERS.

SECTION 2034. Appointment of master.

2035. When must be on board.

2036. Pilotage.

2037. Power of master over seamen.

2038. Power of master over passengers.

2039. Impressing private stores.

2040. When may abandon the ship.

2041. Duties on abandonment.

2042. When master cannot trade on his own account.

2043. Care and diligence.

2044. Authority of master.

2034. The master of a ship is appointed by the owner, and holds during his pleasure. Appoint-
ment of
master.

NOTE.—The master is appointed by the owner, and the appointment holds him forth to the public as a person worthy of trust and confidence, and the appointment may be revoked at any time.—See 3 Kent Com., p. 161; Ward vs. Ruckman, 34 Barb., p. 419. The French Code de Commerce, Art. 219, provides that if a master who is dismissed is one of the owners of the ship, he may renounce his interest to the others and require from them the payment of the value thereof. It would probably be just to establish some such provision in favor of a master dismissed without good cause.

2035. The master of a ship is bound to be always on board when entering or leaving a port, harbor, or river. When must
be on board

NOTE.—Code de Com., Art. 227.

2036. On entering or leaving a port, harbor, or river, the master of a ship must take a pilot if one offers himself, and while the pilot is on board the navigation of the ship devolves on him. Pilotage.

NOTE.—Regulations respecting pilots of this State are contained in the Political Code, particularly Sec. 2436. It is the duty of the master engaged in a foreign trade to put his ship under the charge of a pilot, both on his outward and homeward voyage, when he is within the usual limits of the pilot's employment.—3 Kent's Comm., pp. 175, 176. See Sec. 2436, Pol. Code Cal., as to duties of pilots to cruise "at least ten miles seaward." By Sec. 2431, Pol. Code Cal., vessels coasting between San Francisco and Oregon, Washington, and Alaska ports, and all coasting between ports in this State, are exempt from pilotage dues; but these provisions, except in so far as they are recognized by the laws of trade and commerce, do not affect the relations of owner and master, as between themselves, nor their duties to the owners of cargoes, policies of insurance, bottomry, respondentia, and the like. A foreign voyage, in the language of trade and commerce, means a voyage to some port or place within the territory of a foreign nation.—Duties of Collection, Act of 1799, Chap. 128; 1790, Chap. 56; 1813, Chap. 2, U. S. Congress.

Power of
master over
seamen.

2037. The master of a ship may enforce the obedience of the mate and seamen to his lawful commands by confinement and other reasonable corporal punishment, not prohibited by Acts of Congress, being responsible for the abuse of his power.

NOTE.—The law makes no distinction between the officers, or mates, as they are called, and the common sailors.—Pars. Merc. Law, p. 385; Grant vs. Bailey, 12 Mod., p. 440. His (master's) authority at sea is necessarily summary, and often absolute. * * * He should maintain perfect order, and preserve the most exact discipline, under the guidance of justice, moderation, and good sense.—3 Kent's Comm., pp. 159, 160. The mate is the next officer, and, *virtute officii*, discharges in addition the duties of master in case he dies, etc.—3 Kent's Comm., p. 176. Because he is responsible over to his employers for his conduct of the ship, etc., the master has great authority over the mariners on shipboard. He may imprison, and also inflict reasonable corporal punishment upon a seaman for disobedience to reasonable commands, or for disorderly, riotous, or insolent conduct; and his authority in that respect is analogous to that of a master on land over his apprentice or scholar.—3 Kent's Comm., pp. 181, 182, and Note "a," and authorities and cases there cited. Something more than a suspicion that a sailor is a dangerous man, is required to justify his imprisonment.—Jay vs. Almy, 1 Wood & M. R., p. 262. Flogging in the navy was abolished by Act of Congress, 28th Sept., 1850.—Act of 31st Congress, Chap. 80. The law watches the exercise of discretionary power with a jealous eye. If the correction be excessive or unjustifiable, the seaman is sure to receive compensation in damages on his return to port, in an action at common law.—3 Kent's Comm., p. 182; see, also, Pars. Mart. Law, Vol. I, p. 463. The subordinate officers have no authority to punish a seaman when the master is on board, unless by his orders.—Elwell vs. Martin, Ware's Rep., p. 53; Butler vs. McMillan, id., p. 219; United States vs. Ruggles, 5 Mason's Rep., p. 192.

Power of
master over
passengers.

2038. The master of a ship may confine any person on board, during a voyage, for willful disobedience to his lawful commands.

NOTE.—See note to preceding section; see, also, Parsons on Mart. Law, Vol. I, pp. 391, 392, 393, 394, and

notes particularly on pp. 394, 395, Notes 1, 2, and 3. Sec. 7 of the Act of Congress, 1855 (U. S. Stats. at Large, p. 715), the master of a vessel is authorized to maintain good discipline * * * among the passengers; and to that end shall cause such regulations as he may adopt for that purpose to be posted up on board before sailing, in a place accessible to such passengers. The master may also restrain, or even confine a passenger who refuses to submit to the necessary discipline of the ship.—3 Kent's Comm., p. 183; Boyce vs. Bayliffe, 1 Campb., N. P. Rep., p. 58; Prendergast vs. Compton, 8 Car. & Pa., p. 454. See, also, the remarks of Mr. Justice Story on the duty of decorous deportment to passengers by the master.—Chamberlain vs. Chandler, 3 Mason, p. 242.

2039. If, during a voyage, the ship's supplies fail, the master, with the advice of the officers, may compel persons who have private supplies on board to surrender them for the common want, on payment of their value, or giving security therefor.

Impressing
private
stores.

NOTE.—See Code de Com., Art. 249.

2040. The master of a ship must not abandon it during the voyage, without the advice of the other officers.

When may
abandon
the ship.

NOTE.—Pars. Mart. Law, Vol. I, p. 313, discusses this subject, and particularly "*jettison*," and says this practice of consulting the officers has passed away, and doubts the propriety of his doing so in any event; but favors plenary powers solely in the master. But *id.*, p. 454, Sec. 4, of Chap. 12: The seaworthiness of a ship is provided by statute, to be ascertained on complaint of mate and crew by a survey at home or abroad. Act 1850, Chap. 27, Sec. 6, 9 U. S. Stats. at Large, p. 441. All which favors the rule of the text.

2041. The master of a ship, upon abandoning it, must carry with him, so far as it is in his power, the money and the most valuable of the goods on board, under penalty of being personally responsible. If the articles thus taken are lost from causes beyond his control, he is exonerated from liability.

Duties on
abandon-
ment.

NOTE.—Code de Com., Art. 241.

When master cannot trade on his own account.

2042. The master of a ship, who engages for a common profit on the cargo, must not trade on his own account, and if he does, he must account to his employer for all profits thus made by him.

NOTE.—In a case where the master was to receive a certain sum per month as wages and a commission of five per cent, and also a proportion of the profits, it was held that he could not traffic on his own account for his own benefit.—1 Pars. Mart. Law, pp. 379-80; *Mathewson vs. Clarke*, 6 How., p. 122; Code de Com., Arts. 239-240.

Care and diligence.

2043. The master of a ship must use great care and diligence in the performance of his duties, and is responsible for all damage occasioned by his negligence, however slight.

NOTE.—He must take on board and carefully preserve all such papers as the ship should carry and as fall within his duty. During the whole voyage he must conduct himself, not only under ordinary circumstances, but in all exigencies and emergencies, with due discretion, courage, and energy, and *complete fidelity to his duties*.—1 Pars. Mart. Law, p. 378, Chap. 11, Sec. 1. Goods injured, responsible for.—Id., p. 384; see, also, Code de Com., Art. 221. The master is responsible personally for any damages or injury to the ship or cargo, or loss of either by reason of his negligence or misconduct.—3 Kent Comm., p. 181.

Authority of master.

2044. The authority and liability of the master of a ship, as an agent for the owners of the ship and cargo, are regulated by the Title on Agency.

NOTE.—See Title IX, "Agency," Sec. 2295, et seq.

* ARTICLE V.

MATES AND SEAMEN.

SECTION 2048. Mate, what.

2049. Seamen, what.

2050. Mate and seamen, how engaged and discharged.

2051. Unseaworthy vessel.

2052. Seamen not to lose wages or lien by agreement.

2053. Special agreement with seamen.

SECTION 2054. Wages depend on freightage.

2055. When wages, etc., begin.

2056. Wages, where voyage is broken up before departure.

2057. Wrongful discharge.

2058. Wages, when not lost by wreck.

2059. Certificate.

2060. Disabled seamen.

2061. Maintenance of seamen during sickness.

2062. Death on the voyage.

2063. Theft, etc., forfeits wages.

2064. Seamen cannot ship goods.

2065. Embezzlement and injuries.

2066. Law governing seamen.

2048. The mate of a ship is the officer next in rank to the master, and in case of the master's disability he must take his place. By so doing he does not lose any of his rights as mate. Mate, what.

NOTE.—The mate succeeds the master *virtute officii*, but does not cease to be mate; but his duties are cumulative.—3 Kent's Comm.; see, also, 2 Metc., p. 445.

2049. All persons employed in the navigation of a ship, or upon a voyage, other than the master and mate, are to be deemed seamen within the provisions of this Code. Seamen, what.

NOTE.—See The Prince George, 3 Hagg. Adm., p. 376; The Jane and Matilda, 1 id., p. 187; The Highlander, Sprague, p. 588.

2050. The mate and seamen of a ship are engaged by the master, and may be discharged by him at any period of the voyage, for willful and persistent disobedience or gross disqualification, but cannot otherwise be discharged before the termination of the voyage. Mate and seamen, how engaged and discharged.

NOTE.—3 Kent's Comm., Sec. 176, et seq.; also, Act of 1790, Chap. 29, 1 U. S. Stats. at Large, p. 131, where the employment of seamen is regulated; see, also, subsequent Acts of Congress enumerated on p. 177, 3 Kent, supra; 1 Pars. Mart. Law, p. 442, Chap. 12, Sec. 2.

2051. A mate or seamen is not bound to go to sea in a ship that is not seaworthy; and if there is reason- Unseaworthy vessel.

able doubt of its seaworthiness, he may refuse to proceed until a proper survey has been had.

NOTE.—If the mate and a majority of the (seamen) crew, after the voyage is begun, but before the vessel leaves the land, deem the vessel unsafe (i. e., not seaworthy), or not duly provided, and shall require an examination of the ship, the master must proceed to, or stop at, the nearest or most convenient port, where an inquiry is to be made. The parties are bound by the result of the inquest.—See 3 Kent's Comm., pp. 177-8. "Seaworthiness."—See 1 Pars. Mart. Law, p. 454, Chap. 12, Sec. 4; U. S. vs. Givings, Sprague, p. 75; The Hibernia, id., p. 78.

Seamen
not to lose
wages or
lien by
agreement.

2052. A seaman cannot, by reason of any agreement, be deprived of his lien upon the ship, or of any remedy for the recovery of his wages to which he would otherwise have been entitled. Any stipulation by which he consents to abandon his right to wages in case of the loss of the ship, or to abandon any right he may have or obtain in the nature of salvage, is void.

NOTE.—From 13 and 14 Vic., Chap. 93, Sec. 53. Any stipulations contravening the language or the policy of the statute are of course void.—1 Pars. Mart. Law, pp. 445, 446; Herndon vs. Gordon, 2 Mason, p. 541; Cutter vs. Powell, 6 T. R., p. 320; Appleby vs. Dods, 8 East, p. 300; Jesse vs. Roy, 4 Tyrw., p. 626; 1 Crompt. M. & R., p. 316. In this case Lord Lyndhurst, C. B., said: "I know of no principle by which a contract entered into by mariners is to be construed differently from those made among other persons." See, also, The Juliana, 2 Dods., p. 504, as to void provisions in stipulations.

Special
agreement
with
seamen.

2053. No special agreement entered into by a seaman can impair any of his rights, or add to any of his obligations, as defined by law, unless he fully understands the effect of the agreement, and receives a fair compensation therefor.

NOTE.—The Highlander, Sprague, p. 510; Brown vs. Lull, 2 Sumn., p. 443; The Juliana, 2 Dods., p. 504; Mary Paulina, Sprague, p. 45; see, also, 1 Pars. Mart. Law, pp. 445, 446, 447, 448, 449, and notes; Pars. Merc. Law, pp. 385 to 396, and notes.

2054. Except as hereinafter provided, the wages of seamen are due when, and so far only as, freightage is earned, unless the loss of freightage is owing to the fault of the owner or master.

Wages
depend on
freightage.

NOTE.—“Due as freightage is earned.”—*Van Beuren vs. Wilson*, 9 Cow., p. 158; *Icard vs. Goold*, 11 Johns., p. 279; *Porter vs. Andrews*, 9 id., p. 350; *Dunnett vs. Tomhagen*, 3 Johns., p. 154; see *Worth vs. Mumford*, 1 Hilt., p. 1. “Unless the loss of freightage is fault of the owner.”—*Hoyt vs. Wildfire*, 3 Johns., p. 518; *Sullivan vs. Morgan*, 11 id., p. 66; see *Murray vs. Kellogg*, 9 id., p. 227; see, also, *Pars. Merc. Law*, pp. 385 to 396, and notes.

2055. The right of a mate or seaman to wages and provisions begins either from the time he begins work, or from the time specified in the agreement for his beginning work, or from his presence on board, whichever first happens.

When
wages, etc.
begin.

NOTE.—From 13 and 14 Vic., Chap. 93, Sec. 56; see, also, *Pars. Merc. Law*, pp. 385 to 396, and notes.

2056. Where a voyage is broken up before departure of the ship, the seamen must be paid for the time they have served, and may retain for their indemnity such advances as they have received.

Wages,
where
voyage is
broken up
before
departure.

NOTE.—Modified from *Code de Com.*, Art. 252; see, also, *Pars. Merc. Law*, pp. 385 to 396, and the Acts of Congress there referred to in Notes 1, 2, 3, p. 394, and Notes 1, 2, 3, 4, p. 395, and cases there cited; and 1 *Pars. Mart. Law*, Chap. 12, Sec. 2. Compare the above references. The settled rule appears to be that if the voyage is broken up, or the seamen are dismissed without cause before the voyage begins, they have their wages for the time they serve and a reasonable compensation for special damages.—2 *Pars. Mart. Law*, Chap. 6, p. 573; *Parry vs. The Peggy*, 2 *Browne Civ. and Adm. Law*, p. 533; based on *Wells vs. Osmond*, 2 *Show.*, p. 238.

2057. When a mate or seaman is wrongfully discharged, or is driven to leave the ship by the cruelty of the master on the voyage, it is then ended with

Wrongful
discharge.

respect to him, and he may thereupon recover his full wages.

NOTE.—Ward vs. Ames, 9 Johns., p. 138; The Minerva, 1 Hagg. Adm., p. 368. Reasonable apprehension of cruelty has been held sufficient excuse for desertion.—Edward vs. Trevellick, 4 El. & B., p. 59; 2 Pars. Mart. Law, p. 574. If the seaman is compelled to desert by the cruelty of the master, he has his wages in full.—Sherwood vs. McIntosh, Ware, p. 109; The America, Blatchf. & H. Adm., p. 185; Limland vs. Stephens, 3 Esp., p. 269; Prince Edward vs. Trevellick, 4 El. & B., p. 59; 28 Eng. L. & Eq., p. 205. If a seaman quits the ship involuntarily, or is driven ashore from necessity, from want of provision, or by reason of cruel usage and for personal safety, the wages are not forfeited, and he will be entitled to receive them in full to the prosperous termination of the voyage.—3 Kent Comm., p. 199, and Note *a* and cases cited.

Wages,
when not
lost by
wreck.

2058. In case of loss or wreck of the ship, a seaman is entitled to his wages up to the time of the loss or wreck, whether freightage has been earned or not, if he exerts himself to the utmost to save the ship, cargo, and stores.

NOTE.—This provision is substantially enacted in England (Stats. 7 and 8 Vict., Chap. 112, Sec. 17), making the seaman's right, however, absolutely dependent upon the officer's certificate. In case of wreck or other peril, the seamen are bound to stay by the vessel and do all they can to save her or her cargo, or as much as can be saved. "Freightage is the mother of wages." This maxim is virtually overridden by this section.—See 2 Pars. Mart. Law, pp. 589, 590. Here, too, the question of salvage and the right of seamen thereto is discussed. See notes, also.

Certificate.

2059. A certificate from the master or chief surviving officer of a ship, to the effect that a seaman exerted himself to the utmost to save the ship, cargo, and stores, is presumptive evidence of the fact.

NOTE.—This section is a necessary sequence to the preceding, and should be recognized as properly providing presumptive evidence of a fact to which the master is frequently the only disinterested witness and the person vested with agency and authority to direct the work.

2060. Where a mate or seaman is prevented from rendering service by illness or injury, incurred without his fault in the discharge of his duty on the voyage, or by being wrongfully discharged, or by a capture of the ship, he is entitled to wages notwithstanding; but in case of a capture, a ratable deduction for salvage is to be made.

Disabled
seamen.

NOTE.—A seaman cannot recover wages for a period during which he was disabled by his own fault (*Johnson vs. Huckins*, Sprague, p. 67; 6 Law Rep., p. 311); but may if not his fault, or by discharging duty, wrongful discharge, or capturing of ship (*Wetmore vs. Henshaw*, 12 Johns., p. 324); but a ratable deduction is made in the case of capture, for salvage (*Wetmore vs. Henshaw*, 12 Johns., p. 324); though disabled by sickness he may recover wages.—2 Pars. Mart. Law, pp. 574, 575; *Mahoon vs. Brig Gloucester*, Bee's Adm., p. 395; *Chandler vs. Grieves*, 2 H. & Bl., p. 606; see, also, *Nevitt vs. Clarke*, Olcott's Adm., p. 316; *Hainey vs. The Tristram Shandy*, Bee's Adm., p. 414.

2061. If a mate or seaman becomes sick or disabled during the voyage, without his fault, the expense of furnishing him with suitable medical advice, medicine, attendance, and other provision for his wants, must be borne by the ship till the close of the voyage.

Maintenance of
seamen
during
sickness.

NOTE.—This exception to the rule is recognized in *Johnson vs. Huckins*, Sprague, p. 67. As to what he must be furnished with, see *Croucher vs. Oakman*, 3 Allen, p. 185; *Harden vs. Gordon*, 2 Mason, p. 541; *Freeman vs. Baker*, 1 Blatchf. & H. Adm., p. 382; *Walton vs. The Neptune*, 1 Pet. Adm., p. 142; *The George*, 1 Sumn., p. 151; *Reed vs. Canfield*, id., p. 197; *Brown vs. Overton*, Sprague, p. 462; *The Forrest*, Ware, p. 420; *Knight vs. Parsons*, Sprague, p. 279. Care of seamen in sickness.—See Pars. Merc. Law, Chap. 12, Sec. 5, p. 456, et seq., and notes.

2062. If a mate or seaman dies during the voyage, his personal representatives are entitled to his wages to the time of his death, if he would have been entitled to them had he lived to the end of the voyage.

Death on
the voyage .

NOTE.—If a seaman on monthly wages dies during

the voyage, it is certain that wages are due to his representatives to the time of his death.—2 Pars. Mart. Law, p. 578.

Theft, etc.,
forfeits
wages.

2063. Desertion of the ship without cause, or a justifiable discharge by the master during the voyage, for misconduct, or a theft of any part of the cargo or appurtenances of the ship, or a willful injury thereto or to the ship, forfeits all wages due for the voyage to a mate or seaman thus in fault.

NOTE.—Continued absence for forty-eight hours without leave is desertion by statute, yet desertion differs from absence without leave. If he deserts before the voyage begins, by not surrendering himself on board, he forfeits his advance wages and an equal sum in addition.—Sec. 2, Act 1790, Chap. 29, 1 U. S. Stats. at Large, p. 181. If apprehended and forced on board, this forfeiture is waived. May be apprehended if he deserts on the voyage, and for such desertion he forfeits all his wages and all his property on board the ship, unless he is received again on board, and he is liable to pay all damages and costs sustained by the owner hiring another seaman in his place.—1 Pars. Mart. Law, pp. 472, 473; Sec. 5, Act of 1790, *supra*; *Spencer vs. Eustis*, 21 Me., p. 519; *Coffin vs. Jenkins*, 3 Story, p. 108; *Cloutman vs. Tunison*, 1 Sumn., p. 373.

Seamen
cannot ship
goods.

2064. A mate or seaman may not, under any pretext, ship goods on his own account without permission from the master.

NOTE.—Code de Com., Art. 251.

Embezzle-
ment and
injuries.

Reu
2065. If any part of the cargo or appurtenances of a ship is embezzled or injured by the mate or a seaman, the offender, or, if it is not known which is the offender, all those of whom negligence or fault may be presumed, must make good the loss.

NOTE.—Mariners are bound to contribute out of their wages for embezzlements of the cargo or injuries produced by the misconduct of any of the crew. This rule neither public policy nor the principles of justice extend to the contribution or forfeiture of wages beyond the parties immediately "*in delicto*." Those of the

crew presumed guilty are sureties for each other.—3 Kent Comm., p. 194; Joy vs. Allen, 2 Wood & M. R., p. 304; Thompson vs. Collins, 4 Bos. & Pull., p. 347; Lewis vs. Davis, 3 Johns. N. Y. Rep., p. 17; Spear vs. Pearson, 1 Mass., p. 104.

2066. The shipment of officers and seamen, and their rights and duties, are further regulated by Acts of Congress. Law governing seamen.

NOTE.—See Appendix to Vol. I Pars. Mart. Law, pp. 505, et seq., and index thereto, for the various Acts of Congress; also, Acts forty-first Congress, 1870-71; Stats. at Large, p. 440, et seq.

ARTICLE VI.

SHIPS' MANAGERS.

SECTION 2070. Manager, what.

2071. Duties of manager.

2072. Compensation.

2070. The general agent for the owners, in respect to the care of a ship and freight, is called the manager. If he is a part owner, he is also called the managing owner. Manager, what.

NOTE.—The phrase "manager" takes the place of "husband." The term "ship's husband," heretofore used in the books, is discarded. He (may be and) is usually, but not necessarily, a part owner, and is the general agent of the owners in respect to the ship, and may be appointed, like other agents, by written instrument or orally.—1 Pars. Mart. Law, Chap. 4, Sec. 6, p. 97. In our statutes of registration, "husband" is called the managing owner.—Id., p. 99.

2071. Unless otherwise directed, it is the duty of the manager of a ship to provide for the complete seaworthiness of a ship; to take care of it in port; to see that it is provided with necessary papers, with a proper master, mate, and crew, and supplies of provisions and stores. Duties of manager.

NOTE.—Chap. 4, Sec. 6, 1 Pars. Mart. Law, p. 98, it is said that "managers' (husbands') duties are determined by usage." 1 Bell Comm., p. 410 (4th

ed.): "They are, in general, to provide for the complete seaworthiness of the ship, take care of her in port," etc., as in the text. These duties are fully enumerated by Bell (1 Comm., p. 410, Sec. 428, 4th ed.; id., p. 504, 5th ed.): 1. To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a seaworthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy. 3. To see to the due furnishing of provisions and stores, according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the Custom House, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. 6. To enter into proper charter parties, or engage the vessel for general freight under the usual conditions, and to settle for freight and adjust average with the merchant. 7. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship.

Compensation.

2072. A managing owner is presumed to have no right to compensation for his own services.

NOTE.—Benson vs. Heathorn, 1 Younge & C., p. 326; Smith vs. Lay, 3 Kay & Johns., p. 405.

CHAPTER III.

SERVICE WITHOUT EMPLOYMENT.

SECTION 2078. Voluntary interference with property.

2079. Salvage.

Voluntary interference with property.

2078. One who officiously, and without the consent of the real or apparent owner of a thing, takes it into his possession for the purpose of rendering a service about it, must complete such service, and use ordinary care, diligence, and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses incurred by him about

such service from any profits which his service has caused the thing to acquire for its owner, and must account to the owner for the residue.

NOTE.—In 1 Hilliard on Torts, Chap. 3, p. 77, it is said: "He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property general or special, does it at his peril."—Per Sewall, J., Gillis vs. Chase, 10 Mass.; p. 128. The text is founded in and made for a class of cases beyond and without the rule of implied contracts for services performed with the consent of the owner, or when the owner receives to his use the benefit of the service or labor; it also contemplates a *waiver of the tort* and an action in assumpsit for its value. When this is done the defendant is only entitled to that which may be properly termed a recoupment, in case injury, in the place of benefit, had been done the thing or property constituting the subject of the action. 1 Hilliard on Torts, Chap. 1, Sec. 35, treats of the class of cases for which the text has been adopted. It is there said: "Unlike most of the cases of violation of *express or implied agreement*, the technical phrase, *waiver of tort*, refers to a claim for pecuniary compensation under an *implied contract growing out of the wrongful act of the defendant itself*. And it may be stated in general terms, that when one man wrongfully takes another's property and turns it into money, or money's worth, the latter, although having a clear right to maintain an action as for tort, may waive the tort and sue in assumpsit for money had and received." The right of waiving a tort is held to continue under the New York Code of Practice.—Voorhies' Code, p. 18, Sec. 7. When waiver of the tort is implied.—See 1 Hil. on Torts, id., Chap. 1, Sec. 37, and cases cited in notes. A Judge of high authority in Massachusetts (Jackson, J., in Cummings vs. Noyes, 10 Mass., p. 435), says: "It has been long established that the owner of goods tortuously taken, may, in many cases, waive the tort and sue as sounding in contract." "It is," he says, "competent for him to treat the party liable to his action as a purchaser, an agent, or a bailee." 2 Greenleaf Ev., Sec. 108, and ample note (with numerous cases there cited), sustains this position. The rule of the text goes further, and allows expenses to one who adds to the value of the property or thing, not exceeding such increase in value, which in such cases is not improper.

Am
Salvage.

2079. Any person, other than the master, mate, or a seaman thereof, who rescues a ship, her appurtenances or cargo from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the Title on Liens.

NOTE.—Bouvier, in his Law Dictionary, defines "salvage" to be "a compensation given by the maritime law for service rendered in saving property or rescuing it from impending peril on the sea, or wrecked on the coast of the sea, or in the United States on a public navigable river or lake where inter-State or foreign commerce is carried on."—1 Sumn. C. C., pp. 210, 416; 12 How., p. 466; 1 Blatchf. C. C., p. 420; 5 McLean C. C., p. 359; see Baker vs. Hoag, 7 N. Y., p. 557; 2 Pars. Mart. Law, p. 595, et seq., on the subject of salvage generally, and cases there cited in notes.

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